Supreme Court, U.S.
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IN THE

SUPREME COURT of the UNITED STATES

October Term, 1979

No. 79-1618*

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware corporation,

Petitioner,

vs.

RAYMOND KASSEL, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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**See No. 79-1320, Raymond Kassel, et al., v. Consolidated Freightways of Delaware, on appeal.*

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INDEX

Page

OPINION BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

1. THE ORDER CONTRADICTS THE RULE DEVELOPED BY OTHER CIRCUITS TO PROMOTE STATUTORY POLICY AND PERMIT INFORMED REVIEW 5

2. REQUESTED RELIEF 7

CONCLUSION 9

CITATIONS

CASES CITED **Page**

Alyeska Pipeline Service Co. v. Wilderness Soceity, 421 U.S. 240 (1975) 5, 8

Consolidated Freightways v. Kassel, 475 F. Supp. 544, 612 F.2d 1064 (8th Cir. 1979).. 4

Farmington Dowel Products Co. v. Foster Mfg. Co., 436 F. 2d 699, 701 (1st Cir. 1970)..... 6

Hampton v. Hanrahan, 600 F. 2d 600, 643 (7th Cir. 1979) 6

H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949) 5

International Society for Krishna Consciousness, Inc. v. Andersen, 569 F. 2d 1027 (8th Cir. 1978)..... 6

Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714 (5th Cir. 1974)..... 6

Kimbrough v. Arkansas Activities Association, 574 F. 2d 423, 427 (8th Cir. 1978) 6

Lindy Bros. Builders, Inc. of Philadelphia v. American R & S San. Corp., 487 F. 2d 161 (3rd Cir. 1973)..... 6

Lynch v. Household Finance Corp., 405 U.S. 538 (1972)..... 5

Newman v. Piggie Park Enterprises, Inc.,
390 U.S. 400 (1968) 5

Perkins v. Standard Oil Co. of California,
399 U.S. 222 (1970) 8

Raymond v. Rice, 434 U.S. 429, (1978) 8

Sergeant v. Sharp, 579 F. 2d 645 (1st Cir. 1978) 6, 7

Souza v. Southworth, 564 F. 2d 609
(1st Cir. 1977) 8

United States v. Price, 383 U. S. 787 (1966) 5

West v. Kansas Natural Gas Co.,
221 U.S. 229 (1910) 5

Western Union Telegraph Company v. Kansas,
216 U.S. 1 (1910) 5

Wilderness Society v. Morton, 495 F. 2d 1026
(D.C. Cir. 1974) 8

STATUES AND RULES

28 USC §1254(1) 2

42 USC §1983 ..... 3, 5

42 USC §1988 ..... 1, 3, 4, 5

Rule 39, Federal Rules of Appellate Procedure 4

OTHER MATERIALS

U.S. Code Cong. & Admin. News, 1976, p. 1058 5

Article I, §8, of the United States Constitution 3, 5

In The

SUPREME COURT of the UNITED STATES

October Term, 1979

No._____

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware Corporation,

Petitioner,

vs.

RAYMOND KASSEL, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Consolidated Freightways Corporation of Delaware [CF] respectfully prays that a Writ of Certiorari issue to review an order of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 16, 1980.

OPINION BELOW

Petitioner seeks review of an order of the Eighth Circuit denying attorneys' fees under 42 USC §1988, which reads in its entirety as follows:

> "Bill of costs was filed by counsel for appellee. Response to appellee's bill of costs was filed by intervenor, Motor Club of Iowa. Appellants' resistance to appellee's bill of cost was also

> filed. The Court having considered this matter, it is now here ordered that costs of appellee, $131.40, be taxed to appellants. Costs are collectible in the United States District Court for the Southern District of Iowa.
>
> "It is further ordered that motion of appellee to tax disbursements and attorney's fees be and is hereby denied."

Petitioner timely filed a motion to vacate the order. The Eighth Circuit's disposition of that motion was by an order entered February 13, 1980, which reads in its entirety as follows:

> "The Court has considered appellee's [CF's] motion to vacate its order of January 16, 1980, and response thereto. It is now here ordered that appellee's motion be, and is hereby, denied."

No order or opinion has been rendered by the District Court on attorneys' fees. The Eighth Circuit acted on the claim for attorneys' fees on appeal in the first instance because the District Court had, before trial, separated all claims related to attorneys' fees from the case-in-chief which came before the Eighth Circuit on appeal.

JURISDICTION

The order of the Court of Appeals for the Eighth Circuit was entered January 16, 1980. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254 (1).

QUESTION PRESENTED

May a court, without articulating its rationale, summarily deny an application for attorneys' fees under 42 USC §1988?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§1983 Civil Action for Deprivation of Rights.

> "Every person who, under color of any statute, . . .of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, . . . secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

§1988 Proceedings in Vindication of Civil Rights.

> ". . . In any action or proceeding to enforce a provision of section[s] . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs.

STATEMENT OF THE CASE

This Petition relates solely to a claim for attorneys' fees under 42 USC §§1983 and 1988. The related case-in-chief has been brought to this Court on appeal, in No. 79-1320, *Raymond Kassel et al. v. Consolidated Freightways Corporation of Delaware.*

Petitioner brought suit against Respondents, various employees and officials of the State of Iowa, to void an Iowa statute which excluded Petitioner's 65-foot twin trailer vehicles from Interstate Highways in Iowa. Both the District Court and the Eighth Circuit determined that the challenged statute burdened interstate commerce in violation of Art. I, §8, of the United States Constitution,

and sustained Petitioner's right to operate free from that burden on interstate commerce.[1]

Petitioner timely filed a Bill of Costs on appeal, including its claim for attorneys' fees under 42 USC §1988. The filing was accompanied by a notice that the District Court had separated the attorneys' fees claim from the case-in-chief and a request that the matter be referred to the District Court for disposition. Petitioner set out its claim for attorneys' fees on appeal in the Bill of Costs only because apparently required to do so to avoid waiver of the claim.[2]

On January 16, 1980, the Eighth Circuit denied attorneys' fees, without a statement of its rationale. Petitioner timely filed a motion to vacate which requested referral of the claim to the District Court or, in the alternative, an opportunity to file a brief and affidavits in support of the claim. On February 13, 1980, the Eighth Circuit denied the motion, again without a statement of its reasons.

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[1]Not only Petitioner's interests were at stake. Although the ban of 65-foot twins from Interstate Highways in Iowa costs Petitioner and its customers approximately two million dollars annually, the total cost burden exceeded 12 million dollars annually in 1974 by Iowa's estimate. *Consolidated Freightways v. Kassel*, 475 F. Supp. 544, f.n. 2 (1979).

More significantly, both the District Court and the Eighth Circuit found the Iowa statute to detract from safety, 475 F. Supp. 544, 550 (1979). *Consolidated Freightways v. Kassel*, 612 F. 2d 1064, 1070 (1979). The District Court succinctly stated its safety finding in denying Respondents' Motion to Stay, in its order of August 20, 1979: ". . . Under the circumstances, the granting of the stay would result in more accidents, more injuries, more fatalities and more fuel consumption, than would occur if the 65-foot twins were operated through Iowa over I-80 and I-35."

[2]Rule 39, FRAP, appears to require that all costs be filed within 14 days after entry of judgment, in order to avoid waiver. 42 USC §1988 provides that reasonable attorneys' fees may be awarded "as a part of the costs."

Petitioner's claim for attorneys' fees at trial is still pending before the District Court.

REASONS FOR GRANTING THE WRIT

1. THE ORDER CONTRADICTS THE RULE DEVELOPED BY OTHER CIRCUITS TO PROMOTE STATUTORY POLICY AND PERMIT INFORMED REVIEW.

The judgment of the trial and appellate courts establishes a *prima facie* case for grant of attorneys' fees under 42 USC §1988.[3] 42 USC §1988 was a direct Congressional response to this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which denied attorneys' fees absent a statutory basis for their award. Although attorneys' fees are discretionary under the statute, it was the stated intent of Congress that attorneys' fees are to be awarded "unless special circumstances would render such an award unjust."[4]

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[3]Interpreting 42 USC §1983, this Court has stated that the phrase "any rights . . . secured by the Constitution" embraces *"all* of the Constitution and laws of the United States," *Lynch v. Household Finance Corp.*, 405 U.S. 538, 549, f.n. 16 (1972), citing *United States v. Price*, 383 U.S. 787, 796-797 (1966). It is well settled that individuals and corporations have a right to engage in interstate commerce, free from burdensome state regulation, under Art. I, §8, of the United States Constitution, *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 260 (1910); *Western Union Telegraph Company v. Kansas*, 216 U.S. 1, 37 (1910); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949).

[4]The standard was first enunciated in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). This standard has been uniformly adopted for attorney fees claims under 42 USC §1988 and was expressly cited in the legislative history of related amendments to 42 USC §§1983 and 1988, Senate Report No. 94-1011, 94th Congress, 2nd Session (June 29, 1976), reprinted in U.S. Code Cong. & Admin. News, 1976, p. 5908.

Until this case, the Circuit Courts of Appeal which considered the question, including the Eighth Circuit, had uniformly held that trial courts denying attorneys' fees permitted by statute must give their rationale, *Sergeant v. Sharp*, 579 F. 2d 645, 647 (1st Cir. 1978); *International Society for Krishna Consciousness, Inc. v. Andersen*, 569 F. 2d 1027, 1029 (8th Cir. 1978); *Kimbrough v. Arkansas Activities Association*, 574 F. 2d 423, 427 (8th Cir. 1978);[5] *Johnson v. Georgia Highway Express*, 488 F. 2d 714, 717 (5th Cir. 1974); *Lindy Bros. Builders of Philadelphia v. American R & S San. Corp.*, 487 F. 2d 161, 169-170 (3rd Cir. 1973); *Farmington Dowel Products Co. v. Foster Mfg. Co.*, 436 F. 2d 699, 701 (1st Cir. 1970).

In awarding or denying attorneys' fees, an appellate court is bound by the same standards as a trial court, *Hampton v. Hanrahan*, 600 F. 2d 600, 643 (7th Cir. 1979).

There are two reasons for requiring an articulation of the lower court's rationale in denying attorneys' fees under §1988. First, it preserves the Congressional policy of requiring an award absent special circumstances. A finding and explication of the special circumstances forces the court to consider the statute's provisions. Second, denial without explanation, without hearing, and without discernible consideration of the factors involved is a violation

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[5] "We are unable to determine from the District Court's order whether the court's denial of attorney's fees was based on an erroneous belief that the Act [42 USC §1983] did not authorize an award of fees in this case, or whether it was an exercise of its discretionary power under the Act. We, therefore, reverse and remand the cause to the District Court . . ." 574 F. 2d 423, 427

of due process. The violation is particularly repugnant as the lack of a statement of the reasons denies effective review.[6]

In denying attorneys' fees, the Court of Appeals provided no rationale for its order. It neither afforded a full hearing nor permitted filing of a brief and affidavits despite Petitioner's request for an opportunity to address the question. Informed review of the Appellate Court's rationale is made impractical.

2. REQUESTED RELIEF.

Petitioner does not request that this Court determine the propriety of awarding fees in this case. Petitioner requests that, this Court exercise its supervisory powers and remand to the Eighth Circuit with instructions to vacate its order and either (1) reconsider the matter and state the

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[6]"Summary disposition . . . followed by issuance of an order denying counsel fees without an adequate statement of the reasons for the order does not meet minimum standards for procedural fairness and regularity. . . . Nor does an order issued without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision, allow for a disciplined and informed review of the court's discretion. [Citations omitted.]" *Sergeant v. Sharp*, 579 F. 2d 645, 647 (1st Cir. 1978).

reasons for its decision or (2) remand to the District Court for an initial determination of the claim for attorneys' fees.[7]

---

[7]Deference to the trial court on attorneys' fee claims is more than a procedural nicety; it is a substantive and practical approach. The proposition finds its statement in *Souza v. Southworth*, 564 F. 2d 609, 613-614 (1st Cir. 1977);

> "The Supreme Court has recognized the power of a district court to award fees for appellate work under Section 4 of the Clayton Act, *Perkins v. Standard Oil Co. of California*, 399 U.S. 222, 90 S.Ct. 1989, 26 L.Ed. 2d 534 (1970), and the Court of Appeals for the District of Columbia Circuit has argued that as a general rule a district court should in the first instance set the fee for services rendered on appeal. *Wilderness Society v. Morton*, 161 U.S. App. D.C. 446, 495 F. 2d 1026, 1036 (D.C. Cir. 1974), *rev'd sub nom., Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S. Ct. 1612, 44 L.Ed. 2d 141 (1975). Persuasive arguments support the position staked out in *Wilderness Society*. Although a court of appeals might be in the best position to assess the importance and complexity of a case on appeal and the quality of the performance by the attorneys that appear before it, other factors going into a fee determination require factual findings more appropriately made by a district court. . . . As this case illustrates, a district court cannot fully evaluate such litigation without taking into account the history of the dispute on appeal. Having evaluated the appellate work of the attorneys, the district court properly may assign a price tag to it.

The deference is particularly apt in Commerce Clause cases. It is said that Commerce Clause litigation depends in large part on the thoroughness of the attorneys, *Raymond v. Rice*, 434 U.S. 429, 447-448, f.n. 25 (1978).

CONCLUSION

For these reasons, Petitioner requests that a Writ of Certiorari be issued.

Respectfully submitted,

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No. 79-1618

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Supreme Court of the United States

October Term, 1980

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware Corporation,

Petitioner,

vs.

RAYMOND KASSEL, ROBERT RIGLER, L. STANLEY SCHOELERMAN, DONALD GARDNER, JULES BUSKER, ALLAN THOMS, BARBARA DUNN, WILLIAM McGRATH, JON McCOY, CHARLES W. LARSON, EDWARD DICKINSON, RICHARD C. TURNER, and ROBERT D. RAY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 15, 1980
CERTIORARI GRANTED APRIL 6, 1981

INDEX

	Page
Opinions Below	2
Docket Entries	4
Amended Complaint	6
Amended Answer of Defendants	14
Order Bifurcating Attorney Fees Claims From Case-In-Chief	18
Filings with Eighth Circuit Court of Appeals	
Letter to the Court	19
Bill of Costs	20
Resistance to Appellee's Bill of Costs	22
Order	24
Motion to Vacate Order	25
Order	27
Resistance to Appellee's Motion to Vacate Order	29

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1979

No. 79-1709

Consolidated Freightways Corporation of Delaware, a Delaware corporation,

Appellee,

vs.

RAYMOND KASSEL, ETC. *et al.*,

Appellants.

Appeal from the United States District Court for the Southern District of Iowa

Bill of costs was filed by counsel for appellee. Response to appellee's bill of costs was filed by intervenor, Motor Club of Iowa. Appellants' resistance to appellee's bill of cost was also filed. The Court having considered this matter, it is now here ordered that costs of appellee, $131.40. be taxed to appellants. Costs are collectible in the United States District Court for the Southern District of Iowa.

It is further ordered that motion of appellee to tax disbursements and attorney's fees be and is hereby denied.

January 16, 1980

* * * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1979

No. 79-1709

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

Appellee,

v.

RAYMOND KASSEL ETC., *et al.*,

Appellants.

Appeal from the United States District Court
for the Southern District of Iowa

The Court has considered appellee's motion to vacate its order of January 16, 1980, and response thereto. It is now here ordered that appellee's motion be, and is hereby, denied.

February 13, 1980.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

June 13, 1978	—Plaintiff Consolidated Freightways filed its Complaint and Motion for Preliminary Injunction on the U.S. District Court for the Southern District of Iowa.
July 5, 1978	—Defendants' Original Answer filed.
July 26, 1978	—Defendant-Intervenor's Answer filed.
January 22, 1979	—Amended Complaint filed.
February 2, 1979	—Amended Answer of Defendants filed.
May 16, 1979	—Order Bifurcating Attorney Fees Claim from Trial on Case-in-Chief.
May 29, 1979	—Amended Answer of Defendant-Intervenors filed.
June 5, 1979	—Trial Commenced.
June 27, 1979	—Trial Evidence Closed.
August 16, 1979	—Memorandum Opinion, Order, and Judgment entered.
August 17, 1979	—Notice of Appeal filed.
August 20, 1979	—Motion for stay pending appeal denied by District Court.

EIGHTH CIRCUIT COURT OF APPEALS

September 10, 1979	—Motion for stay pending appeal denied by 8th Circuit Court of Appeals.
October 11, 1979	—Oral argument before 8th Circuit Court of Appeals.
December 7, 1979	—District Court decision affirmed.

December 21, 1979	—Appellee's bill of costs filed [included in those costs were attorney's fees for appellate work under 42 U.S.C. §1988].
January 2, 1980	—Appellant's resistance to Appellee's bill of costs filed.
January 16, 1980	—Taxation of attorney's fees denied by Eighth Circuit Court of Appeals.
January 28, 1980	—Appellee's motion to vacate the order of January 16, 1980, filed.
February 1, 1980	—Defendant's notice of appeal filed.
February 13, 1980	—Motion to vacate is denied by Eighth Circuit Court of Appeals.
May 19, 1980	—Probable Jurisdiction noted.
April 15, 1980	—Petition for Certiorari Docketed.
March 24, 1981	—Lower Court Decisions in No. 79-1320, *Raymond Kassel, et al., v. Consolidated Freightways of Delaware,* affirmed.
April 6, 1981	—Certiorari Granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
AMENDED COMPLAINT
Filed January 22, 1979
[Caption Omitted in Printing]

NOW COMES the Plaintiff, Consolidated Freightways Corporation of Delaware, a Delaware corporation, and for a Complaint against the above-named Defendants alleges as follows:

I. JURISDICTION

1. This Honorable Court has jurisdiction of this controversy under 28 USC § 1331, 28 USC § 1332, 28 USC § 1343, 42 USC § 1983 and 28 USC § 2201-02.

2. Plaintiff Consolidated Freightways Corporation of Delaware is a Delaware corporation with its principal place of business at 175 Linfield Drive, Menlo Park, California.

3. Defendant Raymond Kassel is the Director of Transportation, State of Iowa, and on information and belief resides at 913 Eleventh Street, Nevada, Iowa 50201.

4. Defendant Robert Rigler is a member and the Chairman of the Transportation Commission, State of Iowa, and on information and belief resides at 251 South Locust Avenue, New Hampton, Iowa 50659.

5. Defendant L. Stanley Schoelerman is a member of the Transportation Commission, State of Iowa, and on information and belief resides at 307 East Fourth, P. O. Box 390, Spencer, Iowa 51301.

6. Defendant Don Gardner is a member of the Transportation Commission, State of Iowa, and on information and belief resides at 3110 Ravenwood Terrace, NW, Cedar Rapids, Iowa 52405.

7. Defendant Jules Busker is a member of the Transportation Commission, State of Iowa, and on information and belief resides at 2902 Jackson, Sioux City, Iowa 51104.

8. Defendant Allan Thoms is a member of the Transportation Commission, State of Iowa, and on information and belief resides at 510 St. George Street, Dubuque, Iowa 52001.

9. Defendant Barbara Dunn is a member of the Transportation Commission, State of Iowa, and on information and belief resides at 530 - 44th Street, Des Moines, Iowa 50312.

10. Defendant William McGrath is a member of the Transportation Commission, State of Iowa, and on information and belief resides at Box 36, Melrose, Iowa 52569.

11. Defendant Jon McCoy is Director of the Motor Vehicle Division, State of Iowa, and resides at 1412 Harding, Ames, Iowa 50010.

12. Defendant Charles W. Larson is Commissioner of the Department of Public Safety, State of Iowa, and on information and belief resides at Rural Route 2, Bittersweet, Newton, Iowa 50208.

13. Defendant Col. Edward Dickinson is Chief of the Iowa Highway Patrol, Department of Public Safety, State of Iowa, and on information and belief resides at 1105 SE Innsbruck Drive, Ankeny, Iowa 50021.

14. Defendant Richard C. Turner is Attorney General, State of Iowa, and on information and belief resides at 1054 - 21st Street, West Des Moines, Iowa 50265.

15. Defendant Robert D. Ray is Governor of the State of Iowa, and on information and belief resides at 2300 Grand Avenue, Des Moines, Iowa 50312.

16. This controversy is between citizens of different states.

17. This action arises under Article I, Section 8, and the Fourteenth Amendment of the United States Constitution and 42 USC § 1983, as more fully appears hereafter.

18. The amount in controversy exclusive of interests and costs exceeds $10,000.00.

II. FIRST CAUSE OF ACTION

19. Plaintiff Consolidated Freightways is a common carrier duly certificated by the Interstate Commerce Commission under Certificate of Public Convenience and Necessity MC-42487 and various subnumbers thereunder. It holds authority to operate as a common motor carrier of general commodities (exluding certain commodities in bulk, certain commodities requiring special handling, household goods, and certain explosives) in interstate and foreign commerce.

20. Pursuant to its operating authority, Plaintiff routinely transports general commodities among customers located in 46 states and Canada. Plaintiff transports general commodities between points where the most direct, efficient, and rapid routing would be through Iowa, and Plaintiff transports general commodities between customers served by its terminals located in Cedar Rapids, Iowa and Des Moines, Iowa, and other points in its system, and in interline service.

21. Interstate 80, beginning in the New York metropolitan area and terminating in the San Francisco metropolitan area is the principal east-west transcontinental highway in the United States, and provides the most direct route for general commodities from the Chicago area and points east to the central West Coast. Inter-

state 80 runs through Iowa from Davenport to Council Bluffs.

22. Interstate 36, beginning in Laredo, Texas and ending in Duluth, Minnesota is a principal, north-south interstate routing through Iowa from a point near Silver Lake, Iowa to a point near Lamoni, Iowa.

23. Interstate 235, is an alternate routing of Interstates 80 and 35 through the Des Moines, Iowa area.

24. Interstate 380, is a connector route connecting Cedar Rapids, Iowa with Interstate 80.

25. Interstate 280 is an alternate routing of Interstate 80 around and through the Moline-Rock Island-Davenport metropolitan area.

26. Interstate 680 is an alternate routing connecting Interstate 80 with Interstate 29 in the Council Bluffs area.

27. Interstate 29, beginning in Kansas City, Missouri and ending at the Canadian border at North Dakota, runs through Iowa from a point near Hamburg, Iowa to Sioux City, Iowa.

28. Attached hereto and incorporated herein are the following:

(a) Exhibit A: a map showing the national Interstate Highway System.

(b) Exhibit B: a map showing the portion of the National Interstate Highway System in Iowa.

(c) Exhibit C: a map showing the routing to Plaintiff Consolidated Freightways' terminal in Des Moines, and

(d) Exhibit D: a map showing the routing to Plaintiff Consolidated Freightways' terminal in Cedar Rapids.

29. A 65-foot twin trailer vehicle combination ("twin trailer") is the standard vehicle for interstate carriage of general commodities in the United States other than in the East Coast and Southeast regions. The vehicle combination consists of a truck-tractor, a trailer approximately 27 or 28 feet in length, a dolly and a second trailer approximately 27 or 28 feet in length. The entire vehicle combination has a length of 65 feet. Attached hereto and incorporated herein as Exhibit E are diagrams illustrating 27 foot twin trailers in combination and 28 foot twin trailers in combination.

30. Plaintiff Consolidated Freightways owns and operates twin trailers in those states where they are legally permissible, and routinely interchanges twin trailer equipment both within its own operations and with other carriers to provide service to and from areas where Plaintiff Consolidated Freightways is not authorized to provide direct service.

31. Section 321.457(6), Code of Iowa, 1977, prohibits the operation of standard sixty-five foot twin trailers in Iowa:

> "No combination of three (3) vehicles coupled together one of which is a motor vehicle, unladen or with load, shall have an overall length, inclusive of front and back bumpers in excess of sixty feet."

32. As a direct consequence of this prohibition, Plaintiff Consolidated Freightways is forced to:

(1) divert through traffic from the most direct routing through Iowa to circuitous routings around Iowa;

(2) operate equipment to serve Iowa customers which is incompatible with its other equipment and with the equipment of other carriers with whom it interchanges equipment; and

(3) operate shuttle operations between other states and terminals in Iowa in which twin trailers are handled separately in single trailer-single tractor units between Iowa terminals and staging areas maintained near the Iowa border.

33. As a consequence of the Iowa ban, Plaintiff Consolidated Freightways' operations are disrupted and fragmented, its operating costs are significantly increased, and it is unable to provide prompt, efficient interstate transportation of goods.

34. Standard sixty-five foot long twin trailers are as safe or are safer than fifty-five foot semi-trailers or sixty foot twin trailer type vehicles which are permitted to operate regularly and routinely in Iowa.

35. Standard sixty-five foot twin trailers cause no greater road wear than is caused by fifty-five foot semi-trailers or sixty foot twin trailers which are permitted to operate regularly and routinely in Iowa.

36. Certain of Defendants and/or their predecessors in office have conducted, or caused to be conducted, studies of sixty-five foot twin trailers. Said studies have indicated that twin trailers are as safe or safer and cause no more road wear than sixty foot twin trailer type vehicles and fifty-five foot semi-trailer vehicles.

37. Iowa has created statutory and administrative exceptions to its general limitations on length which permit the operation in Iowa of vehicles longer than the State's general length limitations, including sixty-five foot twin trailers, where the operations of such vehicles are of principal benefit to Iowa industry, business, and residents.

38. The burdens placed on interstate commerce by the Iowa ban are not justified by legitimate local concerns or interest, are discriminatory, and violate Article I, Section 8 of the United States Constitution.

III. SECOND CAUSE OF ACTION

39. Plaintiff realleges paragraphs 1 through 38 of this Complaint.

40. The actions of Defendants violate the Fourteenth Amendment of the United States Constitution.

IV. THIRD CAUSE OF ACTION

41. Plaintiff realleges paragraphs 1 through 40 of this Complaint.

42. The actions of Defendants are done under color of state law.

43. The actions of Defendants violate 42 USC § 1983.

V. RELIEF REQUESTED

WHEREFORE, on each of the causes of action, Plaintiff requests that this Honorable Court:

1. Enter a declaratory judgment holding that § 321-.457(6), Code of Iowa, 1977, and any other statute, regulation, or ordinance which places greater restrictions on the question of sixty-five foot twin trailers than are placed on the operation of fifty-five foot semi-trailers or sixty foot twin trailers on Interstate Highways 80, 35, 280, 380, 29, 680, and 235, access routes to and from Plaintiff's terminals, and reasonable access from said Interstate Highways to facilities for food, fuel, repairs, or rest are unconstitutional.

2. Enter an injunction restraining Defendants, and any other official of the State of Iowa, operating under Defendants' control, authority, or direction, and any other official charged with the enforcement of laws, or regulations, or ordinances, of the State of Iowa, or of any subdivision, local government or municipality there-

of, from enforcing § 321.457(6), Code of Iowa, 1977), or any other statute, regulation, or ordinance that would limit or burden the operations of sixty-five foot twin trailers on Interstate Highways 80, 35, 280, 380, 29, 680, or 235, access routes to and from Plaintiff's terminals, and reasonable access from said Interstate Highways to facilities for food, fuel, repairs, or rest, to a greater degree than the operation of trucks generally is limited or burdened.

8. Enter a judgment awarding to Plaintiff from Defendants and Defendant-Intervenors the reasonable attorneys' fees, costs and interests in this action.

Dated this 22nd day of November, 1978.

/s/ John H. Lederer
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DEWITT, MCANDREWS & PORTER, S.C.
121 South Pinckney Street
P. O. Box 2509
Madison, Wisconsin 53701
(608) 255-8891

/s/ Terry C. Hancock
TERRY C. HANCOCK
BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE
11th Floor, Des Moines Building
Des Moines, Iowa 50309
(515) 243-4191
Attorneys for Plaintiff Consolidated Freightways Corporation of Delaware

[Certificate of Service Omitted in Printing]

• • • •

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

ANSWER OF DEFENDANTS, RAYMOND KASSEL, ET AL., TO PLAINTIFF'S AMENDED COMPLAINT

Filed February 2, 1979

[Caption Omitted in Printing]

COMES NOW, Defendants, and in answer state as follows:

I. JURISDICTION

1. The allegations contained in I, paragraph 1 of the Plaintiff's Amended Petition are denied.

2. The allegations contained in I, paragraph 2, of Plaintiff's Amended Petition are admitted.

3. The allegations contained in I, paragraphs 3 and 4 of Plaintiff's Amended Petition are admitted.

4. The allegations contained in I, paragraph 5 of Plaintiff's Amended Petition are denied. The Commissioner replacing Mr. Schoelman is Bruce Van Druff whose address is 806 Prospect Street, Red Oak, Iowa 51566.

5. The allegations contained in I, paragraphs 6 through 10 of Plaintiff's Amended Petition are admitted.

6. The allegations contained in I, paragraph 11 of Plaintiff's Amended Petition are denied. Jon McCoy is no longer the Director of the Motor Vehicle Division, State of Iowa. The position is currently vacant.

7. The allegations contained in I, paragraphs 12 and 13 of Plaintiff's Amended Petition are admitted.

8. The allegations contained in I, paragraph 14 of Plaintiff's Amended Petition are denied in that Thomas

J. Miller who resides at the State Capitol Building, First Floor, Des Moines, Iowa 50309, is now the duly elected Attorney General, State of Iowa.

9. The allegations contained in I, paragraphs 15 and 16 of Plaintiff's Amended Petition are admitted.

10. The allegations contained in I, paragraphs 17 and 18 of Plaintiff's Amended Petition are denied.

II. FIRST CAUSE OF ACTION

1. The allegations contained in II, paragraph 19 of Plaintiff's Amended Petition are admitted.

2. The allegations contained in II, paragraph 20 of Plaintiff's Amended Petition are denied.

3. The allegations contained in II, paragraph 21 of Plaintiff's Amended Petition are denied. It is admitted that Interstate 80 runs through Iowa from Davenport, Iowa to Council Bluffs, Iowa.

4. The allegations contained in II, paragraphs 22, 23, 24, 25, 26, and 27 of Plaintiff's Amended Petition are admitted.

5. The allegations contained in II, paragraph 28 of Plaintiff's Amended Petition specifically Exhibits set out in subparagraphs (c) and (d) are denied for lack of sufficient information. Exhibits set out in subparagraphs (a) and (b) are admitted.

6. The allegations contained in II, paragraphs 29 and 30, of Plaintiff's Amended Petition are denied.

7. The allegations contained in II, paragraph 31 of Plaintiff's Amended Petition are denied. It is admitted that:

Section 321.457(6), Code of Iowa, 1977, reads:

> "No combination of three (3) vehicles coupled together, one of which is a motor vehicle, unladen or with load, shall have an overall length, inclusive of front and rear bumpers in excess of sixty feet."

8. The allegations contained in II, paragraph 32 and subparts 1, 2, and 3 of Plaintiff's Amended Petition are denied.

9. The allegations contained in II, paragraphs 33, 34, 35, 36, 37 and 38 are denied.

III. SECOND CAUSE OF ACTION

1. Defendants reanswer paragraphs 1 through 38 as set out in III, paragraph 39 of Plaintiff's Amended Petition.

2. The allegations contained in III, paragraph 40, of Plaintiff's Amended Petition are denied.

IV. THIRD CAUSE OF ACTION

1. Defendants reanswer paragraphs 1 through 40 as set out in IV, paragraph 41, of Plaintiff's Amended Petition.

2. The allegations of IV, paragraph 42 and 43, of Plaintiff's Amended Petition are denied.

V.

WHEREFORE, Defendants, on each the alleged causes of action, request that this Honorable Court:

1. Deny the Plaintiff any relief requested

2. Dismiss Plaintiff's Amended Petition, assessing costs and fees of this action to Plaintiff.

IOWA DEPARTMENT OF
TRANSPORTATION

THOMAS J. MILLER
Attorney General of Iowa

ROBERT W. GOODWIN
Special Assistant Attorney General
and General Counsel to
Department of Transportation

By /s/ Lester A. Paff
LESTER A. PAFF
Assistant Attorney General
Department of Transportation
Ames, Iowa 50010
1-515-296-1636

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Des Moines, Iowa 50309

John Varda
DeWitt, McAndrews & Porter
121 South Pickney Street
Madison, Wisconsin 53703

[Proof of Service Omitted in Printing]

• • • •

IN THE DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA

ORDER

Filed May 16, 1979
[Caption Omitted in Printing]

This matter is now before the Court regarding the plaintiff's Motion to Bifurcate, filed may 7, 1979; . . .

* * *

With respect to the Motion to Bifurcate, the Court has carefully examined the motion and finds that all claims for reasonable attorney fees and costs should be separated from the trial of the other issues to be submitted in this lawsuit.

Accordingly,

IT IS FURTHER ORDERED that the plaintiff's Motion to Bifurcate filed May 7, 1979 be and is hereby granted and that all claims for reasonable attorney fees and costs are hereby bifurcated in the trial of other issues which commences June 4, 1979.

Dated this 16th day of May, 1979.

/s/ R. E. Longstaff
R. E. LONGSTAFF
U. S. MAGISTRATE

* * * *

EIGHTH CIRCUIT COURT OF APPEALS

Filed December 21, 1979

[Letterhead omitted in Printing]

December 20, 1979

Robert C. Tucker, Clerk
U.S. Court of Appeals for the 8th Circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, MO 63101

Re: Consolidated Freightways v. Kassel, et al.
Case No. 79-1709

Dear Mr. Tucker:

Enclosed please find Appellee's Bill of Costs in the above-entitled action. Inasmuch as your letter of December 7, 1979, advised us to file a complete bill of costs, and reasonable attorney's fees may be taxed as costs under 42 USC §1988, our Bill of Costs includes those fees. We have separated those costs taxable under 42 USC §1988 from the other costs. Only fees under §1988 incurred in the appeal itself are included in the Bill of Costs.

Please be advised that the original complaint was brought under 42 USC §1983 and included a demand for attorney's fees. At the request of Plaintiff, the trial court bifurcated the trial, and the amount of attorney's fees to be awarded for the trial of the case has not been determined by the trial court. It is my understanding that opposing counsel will object to any taxation of attorney's fees. Appellee respectfully submits that judicial economy might be served by remanding the amount of fees on appeal to the trial court for determination.

Thank you for your kind attention.

Very truly yours,

DeWITT, McANDREWS & SUNDBY, S.C.

/s/ John H. Lederer

John H. Lederer

JHL:mw
Enclosure

• • • •

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 79-1709

RAYMOND KASSEL, *et al.*,
Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
Appellee.

BILL OF COSTS

This Honorable Court having affirmed the judgment of the Court below on December 7, 1979, Appellee requests the following taxation of costs against Appellants:

Costs under 28 U.S.C. § 1920		
Printing of Briefs and Motions, Motion to Vacate Stay, Brief in Opposition to Motion for Stay, Brief		$ 131.40
Costs under 42 USC § 1988		
Attorney's fees		41,911.00
Disbursements	3,528.70	
(Less printing costs requested under 28 USC § 1920 above)	(131.40)	3,397.30
		$45,439.70

Attached hereto and incorporated herein is an itemization and verification of the above fees and costs.

Dated at Madison, Wisconsin, this 20th day of December, 1979.

Respectfully submitted,

DEWITT, MCANDREWS & SUNDBY, S.C.

By: /s/ John H. Lederer
JOHN H. LEDERER
A Member of the Firm
Attorneys for Appellee

P.O. Address:

121 South Pinckney Street
Madison, WI 53703
Telephone: 608-255-8891

• • • •

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 79-1709

RAYMOND KASSEL, *et al.*,
Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
Appellee.

RESISTANCE TO APPELLEE'S BILL OF COSTS

COME NOW, Appellants, and make the following response to Appellee's submission of its Bill of Costs.

1. Under Rule 39, Rules of Appellate Procedure or as set out in Appellee's Request under 28 U.S.C. § 1920.

Appellants *agree* that $45.90 may be taxed as costs

6 copies of brief on Appeal (51 pgs. at $.15/pg)	$45.90

Appellants *object* to the taxing of:

6 copies of Motion to Vacate Stay (14 pgs. at $.15/pg)	$12.60
6 copies of Brief in Opposition to Motion for Stay (81 pgs. at $.15/pg)	$72.90

2. Appellants object to *any* allowance of attorney's fees to Appellee under Rule 39, Rules of Appellate Pro-

cedure or as set out in Appellee's Request under 42 U.S.C. § 1988.

WHEREFORE, Appellants respectfully submit that $45.90 be taxed as costs against Appellants and that all other costs, disbursements and attorney fees be denied.

IOWA DEPARTMENT OF TRANSPORTATION

THOMAS J. MILLER
Attorney General of Iowa

ROBERT W. GOODWIN
Special Assistant Attorney General

/s/ Lester A. Paff
LESTER A. PAFF
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Des Moines, IA 50309

• • • •

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1979

No. 79-1709

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
Appellee,

vs.

RAYMOND KASSEL, ETC., *et al.*,
Appellants.

Appeal from the United States District Court
for the Southern District of Iowa

Bill of costs was filed by counsel for appellee. Response to appellee's bill of costs was filed by intervenor, Motor Club of Iowa. Appellants' resistance to appellee's bill of cost was also filed. The Court having considered this matter, it is now here ordered that costs of appellee, $131.40, be taxed to appellants. Costs are collectible in the United States District Court for the Southern District of Iowa.

It is further ordered that motion of appellee to tax disbursements and attorney's fees be and is hereby denied.

January 16, 1980

A true copy
Attest:

/s/ Robert D. St. Vrain
Clerk,
U.S. Court of Appeals,
Eighth Circuit

• • • •

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 79-1709

RAYMOND KASSEL, *et al.*,
Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
Appellee.

MOTION TO VACATE ORDER
of January 16, 1980

Appellee, Consolidated Freightways Corporation of Delaware [CF], respectfully moves the Honorable Court to vacate its order dated January 16, 1980, to the extent that it denies CF's motion to tax disbursements and attorneys' fees as costs and to remand to the District Court the question of CF's claim to attorneys' fees and disbursements under 42 USC § 1983 and § 1988. As grounds therefor, CF respectfully represents:

1. CF sought disbursements and attorneys' fees as taxed costs only because apparently required to do so to avoid waiver of the claim. CF assumed that the attorneys' fee question would be remanded to the trial court, which had severed the fee question under § 1983 and § 1988 from the case-on-the-merits, which was the only portion of the proceeding before this Court.

2. § 1983 and § 1988 are applicable.

3. The determination as to whether "special circumstances" warrant denial of attorneys' fees is particularly within the discretion of the trial court.

4. The trial court should be first permitted to determine whether this case presents "special circumstances" warranting denial of attorneys' fees.

5. If this Court is to rule on the question, CF should be permitted to file briefs and affidavits in support of its claim.

WHEREFORE, CF moves this Honorable Court to vacate its order dated January 16, 1980, and to remand to the District Court the question of CF's claim to attorneys' fees and disbursements, under 42 USC § 1983 and § 1988, or, in the alternative, to permit CF to file briefs and affidavits in support of its claim.

Dated at Madison, Wisconsin, this 25th day of January, 1980.

Respectfully submitted,

DEWITT, SUNDBY,
HUGGETT & SCHUMACHER, S.C.

By /s/ John Duncan Varda
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A Member of the Firm

P. O. ADDRESS:
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• • • •

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 79-1709

RAYMOND KASSEL, *et al.*,
Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
Appellee.

RESISTANCE TO APPELLEE'S MOTION TO VACATE ORDER OF JANUARY 16, 1980

COME NOW, Appellants, Raymond Kassel, et al., and in Resistance state:

1. The Appellee, Consolidated Freightways Corporation of Delaware [CF] have selected this forum for determination of attorneys' fees and disbursements under 42 USC § 1983 and § 1988 for appellate work.

2. That § 1983 and § 1988 are not applicable.

3. That the question of "special circumstance" need not be addressed.

WHEREFORE, Appellants, Raymond Kassel, et al ask this Court to dismiss CF's Motion to Vacate, tax costs to CF, and such other orders as this Court deems just.

DEPARTMENT OF TRANSPORTATION

THOMAS J. MILLER
Attorney General of Iowa

/s/ Robert W. Goodwin
ROBERT W. GOODWIN
Special Asst. Attorney General

/s/ Lester A. Paff
LESTER A. PAFF
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General Counsel Division
Ames, IA 50010
(515) 296-1636

Attorneys for Appellants

cc: John Varda
Tony Varda
John Lederer
Bob Lambert
Richard Bittner
Terry Hancock

• • • •

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1979

No. 79-1709

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
Appellee,

v.

RAYMOND KASSEL ETC., *et al.*,
Appellants.

Appeal from the United States District Court
for the Southern District of Iowa

The Court has considered appellee's motion to vacate its order of January 16, 1980, and response thereto. It is now here ordered that appellee's motion be, and is hereby, denied.

February 13, 1980.

FILED
MAY 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1618

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
A DELAWARE CORPORATION,
Petitioner,

VS.

RAYMOND KASSEL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS BRIEF IN OPPOSITION

THOMAS J. MILLER
Attorney General of Iowa

MARK E. SCHANTZ
Solicitor General
Hoover State Office Bldg.
Des Moines, Iowa 50312

ROBERT W. GOODWIN
Special Asst. Atty. General

LESTER A. PAFF
Assistant Attorney General

Attorney for Appellants

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

INDEX

	Page
Orders Below	1
Question Presented	2
Statement of the Case	2
Reasons for Denying the Writ	3
Conclusion	6

TABLE OF AUTHORITIES

Cases

Consolidated Freightways v. *Kassel*, 612 F.2d 1064 (8th Cir. 1975)	2
Lynch v. *Household Finance Corp.*, 405 U.S. 538 (1972)	4
Poirier v. *Hodges*, 445 F.Supp. 838 (M.D. Fla. 1978)	5
Edwards v. *California*, 314 U.S. 160 (1971)	5
Shapiro v. *Thompson*, 394 U.S. 618 (1969)	5

Constitutional Provisions

United States Constitution

Article I, section 8	3, 5
Fourteenth Amendment	4, 5

Statutes

42 U.S.C. § 1983	4, 5
42 U.S.C. § 1988	2, 3, 4, 5-6, 6
28 U.S.C. § 1920	2

Rules

Sup.Ct.R. 19(6)	3
Fed.R.App.P. 27	3
Fed.R.App.P. 39	3
8th Cir. R. 9, 14	3

Other Authority

1976 U.S. Code, Cong. and Ad. News 5908	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1618

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, A DELAWARE CORPORATION,

Petitioner,

VS.

RAYMOND KASSEL, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENTS BRIEF IN OPPOSITION

Respondents, Raymond Kassel, et al., oppose the Petition for a Writ of Certiorari to review the order of the United States Court of Appeals for the Eighth Circuit entered in the above case on January 16, 1980.

ORDERS BELOW

The orders of January 16, 1980 and February 13, 1980, both deny Petitioners application for attorney fees and appear respectively in the appendix hereto, p. 5a and p. 13a, *infra*, and are not reported.

QUESTION PRESENTED

Whether a Court of Appeals may deny without opinion an application for attorney fees which fails to make a colorable showing of entitlement under 42 U.S.C. § 1988?

STATEMENT OF THE CASE

Following entry of judgment in its favor in the court below, *Consolidated Freightways* v. *Kassel*, 612 F.2d 1064 (8th Cir. 1975), Petitioner presented a bill for costs and disbursements including attorney fees to the Eighth Circuit Court of Appeals in total amount of $45,439.70. The procedural history of this claim is summarized below and set forth in the appendix hereto:

December 20, 1979—Petitioner sought a taxing of attorney fees for appellate work under 42 U.S.C. § 1988 plus costs under 28 U.S.C. § 1920. (App., *infra* at p. 1a).

January 2, 1980—Respondent filed its resistance to taxation of attorney fees under 42 U.S.C. § 1988. (App., *infra* at p. 3a)

January 16, 1980—Eighth Circuit Court of Appeals taxes $131.40 to respondent and denies petitioner's request for attorney fees. (App., *infra* at p. 5a)

January 25, 1980—Petitioner filed a "Motion to Vacate the Order of January 16," and Brief. (App., *infra* at p. 6a)

February 4, 1980—Respondent filed "Resistance to Appellee's Motion to Vacate" and Brief. (App., *infra* at p. 8a and p. 10a)

February 13, 1980—Petitioner's Motion to Vacate is denied by the Eighth Circuit Court of Appeals. (App., *infra* at p. 13a)

Petitioners now seek a Writ of Certiorari for review by this Court.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 19 sets forth Considerations Governing Review on Certiorari. Subsection (6) specifies the considerations relevant to review of a decision of a court of appeals. None of those considerations are present here.

Petitioner suggests neither a conflict in circuits nor a conflict with a decision of this Court. To Respondent's knowledge, no court has ever held that a court of appeals must hold an evidentiary hearing when confronted with an application for attorney fees connected with the appeal; nor has any court ever held that 42 U.S.C. § 1988 authorizes an award of attorney fees in a suit alleging an impermissible burden on interstate commerce in violation of Article I, § 8 of the Constitution. Petitioner does not and could not suggest that this case presents "an important question of federal law which has not been, but should be, settled by this Court." Rather, the apparent claim is that the court of appeals "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision."

It is anything but unusual for courts of appeal to deal summarily with applications and motions unrelated to the merits of the appeal. Neither Rule 27 nor Rule 39, Fed.R.App.P., contemplate hearings or elaboration by opinion as a matter of right. Indeed, Local Rules, Eighth Circuit Court of Appeals, contemplate disposition of the merits of appeals without reasoned elaboration. Rule 9 permits summary disposition of frivolous appeals without notice and without argument. Rule 14 permits affirmance without opinion for cases involving disposition of certain recurring issues when an opinion would have no precedential value. Thus, there is nothing particularly startling about an appellate court resolving a question

without reasoned elaboration. Petitioner is particularly ill-positioned to complain about the absence of a written opinion here. Petitioner's Bill of Costs simply stated, without elaboration, without supporting brief and without request for hearing, that the attorney fees were claimed pursuant to 42 U.S.C. § 1988. (App., *infra* at p. 1a). The order of the court rejecting attorney fees was no more lacking in reasoned elaboration than the application which preceded it. From all that was or has now been presented, it would appear that Petitioner's claim for attorney fees is essentially frivolous. Even if the argument were not completely frivolous, it was sufficiently unsupported that a summary rejection of the claim is scarcely so startling as to merit the exercise of this Court's supervisory jurisdiction.

Petitioner's substantive argument for entitlement to attorney fees under 42 U.S.C. § 1988 is contained in a brief footnote. *Petition for Writ of Certiorari* at 5, n. 3. Petitioner relies on language taken out of context from *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549, n. 16 (1972). In context, this Court in *Lynch* was making clear that 42 U.S.C. § 1983 would be construed broadly to encompass all individual constitutional rights guaranteed by the Fourteenth Amendment and would not be limited to so-called "personal" rights. But *Lynch* does not hold that § 1983 encompasses every constitutional claim. Indeed, *Lynch* repeats familiar doctrine:

> The broad concept of civil rights embodied in the 1866 Act and in the Fourteenth Amendment is unmistakably evident in the legislative history of § 1 of the Civil Rights Act of 1871, 17 State 13, the direct lineal ancestor of §§ 1983 and 1343(3). Not only was § 1 of the 1871 Act derived from § 2 of the 1866 Act, but the 1871 Act was passed for the express purpose of "enforc[ing] the Provisions of the Fourteenth Amendment." 17 Stat. 13.

It has never been suggested that claims under Article I provisions that expressly or impliedly restrict state power are "incorporated" into the Fourteenth Amendment. Because they are by their nature restrictions directly upon the states, the question of incorporation as per the Bill of Rights simply does not arise. *See Poirier* v. *Hodges*, 445 F.Supp. 838, 841-42 (M.D. Fla. 1978) (prohibition in Art. I, § 10 of the Constitution against impairing obligation of contract does not create a right redressable under 42 U.S.C. § 1983.)

The Commerce Clause not only does not fall within the ambit of the Fourteenth Amendment, properly understood it does not create a constitutional "right" in the sense that term is employed in 42 U.S.C. § 1983. A constitutional right in that sense is a direct protection from government for the individual. The Commerce Clause does not articulate a right against government.[1] Rather, it allocates authority between the state and national government. Individuals are permitted to challenge state regulations which allegedly burden or discriminate against interstate commerce, but they are seeking to vindicate the national interest in a competitive economy rather than the rights against government of an individual or a class.

Because this commerce clause was not a suit to remedy a deprivation of rights secured to a person by the Constitution within the meaning of 42 U.S.C. § 1983, petitioner was not entitled to attorney fees pursuant to 42

---

[1] The so-called "right to travel" (more accurately labelled the right of interstate migration) has been grounded in the Commerce Clause. *See Edwards* v. *California*, 314 U.S. 160, 171 (1971). More recently this claim has been vindicated under the rubric of equal protection. *See, e.g., Shapiro* v. *Thompson*, 394 U.S. 618 (1969). Wherever its conceptual home, the right to travel is not involved here.

U.S.C. § 1988.[2] This defect in petitioner's application was raised by respondent below and was doubtless the basis for its summary rejection by the Court of Appeals. Having still not mounted a colorable argument to the contrary, Petitioner can scarcely be heard to suggest that this Court should take the unusual step of invoking its supervisory authority.

CONCLUSION

For the reasons stated, Respondents request that a Writ of Certiorari be denied.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

MARK E. SCHANTZ
Solicitor General
Hoover State Office Bldg.
Des Moines, Iowa 50312

ROBERT W. GOODWIN
Special Asst. Atty. General

LESTER A. PAFF
Assistant Attorney General

Attorney for Appellants

---

[2] The legislative history of 42 U.S.C. § 1988, The Civil Rights Attorney's Fees Awards Act of 1976, indicates that its scope also relates to the enforcement of "civil rights" statutes in the Fourteenth Amendment sense of the term and nothing suggests that Commerce Clause cases are within its purview. *See, e.g.*, 1976 U.S. Code, Cong. and Ad. News 5908.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Case No. 79-1709

RAYMOND KASSEL, *et al.*,
Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
Appellee.

BILL OF COSTS

This Honorable Court having affirmed the judgment of the Court below on December 7, 1979, Appellee requests the following taxation of costs against Appellants:

Costs under 28 U.S.C. § 1920		
Printing of Briefs and Motions, Motion to Vacate Stay, Brief in Opposition to Motion for Stay, Brief		$ 131.40
Costs under 42 USC § 1988		
Attorney's fees		41,911.00
Disbursements	3,528.70	
(Less printing costs requested under 28 USC § 1920 above)	(131.40)	3,397.30
		$45,439.70

Attached hereto and incorporated herein is an itemization and verification of the above fees and costs.

Dated at Madison, Wisconsin, this 20th day of December, 1979.

Respectfully submitted,

DEWITT, MCANDREWS & SUNDBY, S.C.

By: /s/ John H. Lederer
JOHN H. LEDERER
A Member of the Firm
Attorneys for Appellee

P.O. Address:

121 South Pinckney Street
Madison, WI 53703
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 79-1709

RAYMOND KASSEL, *et al.*,
Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
Appellee.

RESISTANCE TO APPELLEE'S BILL OF COSTS

COME NOW, Appellants, and make the following response to Appellee's submission of its Bill of Costs.

1. Under Rule 39, Rules of Appellate Procedure or as set out in Appellee's Request under 28 U.S.C. § 1920.

Appellants *agree* that $45.90 may be taxed as costs

6 copies of brief on Appeal (51 pgs. at $.15/pg)	$45.90

Appellants *object* to the taxing of:

6 copies of Motion to Vacate Stay (14 pgs. at $.15/pg)	$12.60
6 copies of Brief in Opposition to Motion for Stay (81 pgs. at $.15/pg)	$72.90

2. Appellants object to *any* allowance of attorney's fees to Appellee under Rule 39, Rules of Appellate Pro-

cedure or as set out in Appellee's Request under 42 U.S.C. § 1988.

WHEREFORE, Appellants respectfully submit that $45.90 be taxed as costs against Appellants and that all other costs, disbursements and attorney fees be denied.

IOWA DEPARTMENT OF TRANSPORTATION

THOMAS J. MILLER
Attorney General of Iowa

ROBERT W. GOODWIN
Special Assistant Attorney General

/s/ Lester A. Paff
LESTER A. PAFF
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Iowa Department of Transportation
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Attorney for Appellants

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1979

No. 79-1709

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
Appellee,

vs.

RAYMOND KASSEL, ETC., *et al.*,
Appellants.

Appeal from the United States District Court
for the Southern District of Iowa

Bill of costs was filed by counsel for appellee. Response to appellee's bill of costs was filed by intervenor, Motor Club of Iowa. Appellants' resistance to appellee's bill of cost was also filed. The Court having considered this matter, it is now here ordered that costs of appellee, $131.40, be taxed to appellants. Costs are collectible in the United States District Court for the Southern District of Iowa.

It is further ordered that motion of appellee to tax disbursements and attorney's fees be and is hereby denied.

January 16, 1980

A true copy
Attest:

/s/ Robert D. St. Vrain
Clerk,
U.S. Court of Appeals,
Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 79-1709

RAYMOND KASSEL, *et al.*,
Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
Appellee.

MOTION TO VACATE ORDER
of January 16, 1980

Appellee, Consolidated Freightways Corporation of Delaware [CF], respectfully moves the Honorable Court to vacate its order dated January 16, 1980, to the extent that it denies CF's motion to tax disbursements and attorneys' fees as costs and to remand to the District Court the question of CF's claim to attorneys' fees and disbursements under 42 USC § 1983 and § 1988. As grounds therefor, CF respectfully represents:

1. CF sought disbursements and attorneys' fees as taxed costs only because apparently required to do so to avoid waiver of the claim. CF assumed that the attorneys' fee question would be remanded to the trial court, which had severed the fee question under § 1983 and § 1988 from the case-on-the-merits, which was the only portion of the proceeding before this Court.

2. § 1983 and § 1988 are applicable.

3. The determination as to whether "special circumstances" warrant denial of attorneys' fees is particularly within the discretion of the trial court.

4. The trial court should be first permitted to determine whether this case presents "special circumstances" warranting denial of attorneys' fees.

5. If this Court is to rule on the question, CF should be permitted to file briefs and affidavits in support of its claim.

WHEREFORE, CF moves this Honorable Court to vacate its order dated January 16, 1980, and to remand to the District Court the question of CF's claim to attorneys' fees and disbursements, under 42 USC § 1983 and § 1988, or, in the alternative, to permit CF to file briefs and affidavits in support of its claim.

Dated at Madison, Wisconsin, this 25th day of January, 1980.

Respectfully submitted,

DEWITT, SUNDBY,
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By /s/ John Duncan Varda
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 79-1709

RAYMOND KASSEL, *et al.*,
Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
a Delaware corporation,
Appellee.

RESISTANCE TO APPELLEE'S MOTION TO VACATE ORDER OF JANUARY 16, 1980

COME NOW, Appellants, Raymond Kassel, et al., and in Resistance state:

1. The Appellee, Consolidated Freightways Corporation of Delaware [CF] have selected this forum for determination of attorneys' fees and disbursements under 42 USC § 1983 and § 1988 for appellate work.

2. That § 1983 and § 1988 are not applicable.

3. That the question of "special circumstance" need not be addressed.

WHEREFORE, Appellants, Raymond Kassel, et al ask this Court to dismiss CF's Motion to Vacate, tax costs to CF, and such other orders as this Court deems just.

DEPARTMENT OF TRANSPORTATION

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Attorney General of Iowa

/s/ Robert W. Goodwin
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 79-1709

RAYMOND KASSEL, *et al.*,
Appellants,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
Appellee.

BRIEF IN OPPOSITION OF MOTION TO VACATE ORDER OF JANUARY 16, 1980

This motion seeks to remand for determination by the trial court, this Court's determination that attorney fees and disbursements for CF's [plaintiff-below] appellate work is inappropriate. Principally, Appellee's Brief in Support of its Motion to Vacate is an argument that 42 USC § 1983 and, hence, 42 USC § 1988 are applicable.

The specific finding of the trial court is as follows:

> The Court is of the opinion that none of the pertinent regulations discriminate against interstate commerce. The Court is also of the opinion that CF did not establish unequal or improper enforcement of the law or regulation. Discriminating enforcement constituting a discrimination against interstate commerce was not proven. (Opinion—Stuart at page 14).

CF chose *not* to appeal this finding. CF chose *not* to ask the trial Court for an enlargement of findings of

fact and/or conclusions of law. Instead, CF having prevailed upon the principle contention that Iowa's length limitation with regard to double bottoms created an unconstitutional burden on interstate commerce, press their § 1983 claim under the guise of non-waiver. This position is without merit. The trial Court found no violation by state defendants giving rise to a § 1983 violation. Therefore, without a specific finding this Court properly determined that attorney fees in a commerce clause case are inappropriate.

CF's argument that rights arising out of the commerce clause are automatically within the ambit of § 1983 is not solace. The case here and below was not a "right to travel" case as CF now tries to characterize. The argument misconstrues the commerce clause which fundamentally allocates power between the federal government and states, whereas § 1983 and § 1988 deal with individual civil rights or those protected by the 14th Amendment and the Constitution. There is no case supporting CF's contention that attorney fees are appropriate in commerce clause cases. The narrow holding of *Raymond* v. *Rice* 434 U.S. 429 at 447

> Our holding is a narrow one, for we do not decide whether laws of other states restricting the operation of trucks over 55 feet long, or of double-trailer trucks, would be upheld if the evidence produced on the safety issue were not so overwhelmingly one-sided as in this case.

suggests that other states should be allowed to enforce their laws without the threat of unwarranted fees. Also, there is an absence of a statute enabling the award of attorney fees.

In sum, this Court's denial of an attorney fee and disbursement request is proper and the Order of January 16, 1980, should not be vacated.

DEPARTMENT OF TRANSPORTATION

THOMAS J. MILLER
Attorney General of Iowa

/s/ Robert W. Goodwin
ROBERT W. GOODWIN
Special Asst. Attorney General

/s/ Lester A. Paff
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1979

No. 79-1709

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
Appellee,

v.

RAYMOND KASSEL ETC., *et al.*,
Appellants.

Appeal from the United States District Court
for the Southern District of Iowa

The Court has considered appellee's motion to vacate its order of January 16, 1980, and response thereto. It is now here ordered that appellee's motion be, and is hereby, denied.

February 13, 1980.

Office-Supreme Court, U.S.
FILED
JUN 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 79-1618

IN THE

Supreme Court of the United States

October Term, 1980

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware Corporation,

Petitioner,

vs.

RAYMOND KASSEL, ROBERT RIGLER, L. STANLEY SCHOELERMAN, DONALD GARDNER, JULES BUSKER, ALLAN THOMS, BARBARA DUNN, WILLIAM McGRATH, JON McCOY, CHARLES W. LARSON, EDWARD DICKINSON, RICHARD C. TURNER, and ROBERT D. RAY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

May a court, without articulating its rationale, summarily deny an application for attorneys' fees under 42 U.S.C. §1988?

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF CASE..... 3

SUMMARY OF ARGUMENT 4

ARGUMENT..... 5

I. THE SOLE ISSUE BEFORE THE COURT IS WHETHER THE LOWER COURT MUST STATE ITS REASONING..... 5

II. THIS COURT MUST REMAND TO PROTECT ITS POWER TO REVIEW.

A. The Power To Require An Opinion Is Inherent In The Power To Review 8

B. The Power To Review Is Impaired By The Lower Court's Failure To State Reasons..... 8

C. Failure To State Reasons Denies The Litigants Fairness 10

III. THE COURTS HAVE HELD THAT ATTORNEYS' FEE DECISIONS REQUIRE A STATEMENT OF REASONS.

A. Review Of Attorneys' Fee Awards Requires a Statement Of Reasons 11

B. This Court Has Held That A Court Of Appeals Must State The Reasons For Denial Of Attorneys' Fees 13

IV. REMAND TO THE CIRCUIT COURT WITH INSTRUCTION TO REMAND TO THE DISTRICT COURT IS THE APPROPRIATE RELIEF.

A. The District Court Is Better Able Than The Appellate Court To Determine Attorneys' Fees 14

B. Congress Did Not Intend The Courts Of Appeals To Initially Determine Attorneys' Fee Awards..... 15

CONCLUSION 17

CITATIONS

CASES CITED **Page**

Adams v. United States, 620 F.2d 1277 (8th Cir. 1980) *cert. denied* 101 S.C. 88 (1980)..... 15

Aware Woman Clinic, Inc. v. City of Cocoa Beach, 629 F.2d 1146 (5th Cir. 1980)..... 15

Blackburn v. Alabama, 354 U.S. 393 (1957)..... 8

Bond v. Stanton, 630 F.2d 1231 (7th Cir. 1980)..... 15

Booker v. Brown, 619 F.2d 57 (10th Cir. 1980)..... 15

Brown v. Bathke, 566 F.2d 588 (8th Cir. 1977)..... 9, 15

Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980)..... 9, 15

Crain v. City of Mountain Home, Arkansas, 611 F.2d 726 (8th Cir. 1979)..... 15

Consolidated Freightways v. Kassel, 612 F.2d 1064 (8th Cir. 1979)..... 3

Dawson v. Pastrick, 600 F.2d 70 (7th Cir. 1979)..... 15

Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978)..... 10

Entertainment Concepts, Inc., III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3617 (U.S. 2/24/81) (No. 80-1039)..... 15

Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980)..... 15

Fitzpatrick v. Bitzer, 455 F. Supp. 1338 (D. Conn. 1978)..... 15

Fountila v. Carter, 571 F.2d 487 (9th Cir. 1978)..... 12, 15

Gary W. v. State of Louisiana, 622 F.2d 804 (5th Cir. 1980)..... 15

Gay Lib v. University of Missouri, 588 F.2d 848 (8th Cir. 1977) *cert. denied*, 434 U.S. 1080 (1978)..... 15

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938)..... 6

Green v. Ten Eyck, 572 F.2d 1233 (8th Cir. 1978)..... 9, 15

Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980)..... 15

Honeyman v. Hanan, 300 U.S. 14 (1937)..... 8

International Society for Krishna Conscionsuess, Inc. v. Anderson, 569 F.2d 1027 (8th Cir. 1978) 12

Iranian Students Assoc. v. Edwards, 604 F.2d 352 (5th Cir. 1979)..... 15

Irvine v. California, 377 U.S. 426 (1964)..... 6

J. I. Case Co. v. Borak, 377 U.S. 426 (1964)..... 6

Johnson v. State of Mississippi, 606 F.2d 635 (5th Cir. 1979)..... 15

Kassel v. Consolidated Freightways, 49 U.S.L.W. 4328..... 4

Kimbrough v. Arkansas Activities Assoc., 574 F.2d 423 (8th Cir. 1978) 9, 13

Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980) 10

Love v. Mayor of Cheyenne, 620 F.2d 235 (10th Cir. 1980) 15

Mayor v. Educational Equality League, 415 U.S. 605 (1974)..... 6

McGowan v. King, Inc., 616 F2d 745 (5th Cir. 1980)..... 12

McManama v. Lukhard, 616 F 2d 727 (4th Cir. 1980) 15

Mid-Hudson Legal Services, Inc. v. G&U, Inc.,
578 F.2d 34 (2d Cir. 1978), *on remand*,
465 F. Supp. 261 (S.D.N.Y. 1978) 15

Minnesota v. National Tea Co.,
309 U.S. 551 (1940)..... 8

National Licorice Co. v. National Labor Relations Board, 309 U.S. 350 (1940)..... 6

Newman v. Piggie Park Enterprises, Inc.,
390 U.S. 400 (1968)..... 12

Northcross v. Board of Education,
412 U.S. 427 (1973)..... 8, 13, 14

Northcross v. Board of Education, 611 F.2d 624
(6th Cir. 1979), *cert. denied*, 447 U.S. 911
(1980) 15

O'Neil v. City of Lake Oswego,
642 F.2d 367 (9th Cir. 1981) 12

Panama Mail Steamship Co. v. Vargas,
281 U.S. 670 (1930)..... 8

Parker v. Califano,
561 F.2d 320 (D.C. Cir. 1977), *on remand*,
443 F. Supp. 789 (D. DC 1978) 15

Perkins v. Standard Oil Co. of California,
399 U.S. 222 (1970)..... 14

Prandini v. National Tea Co.,
585 F.2d 47 (3d Cir. 1978) 15

Public Service Commission of Wisconsin v. Wisconsin Telephone Co., 289 U.S. 67 (1933) 8

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980)..... 16

Sargent v. Sharp, 579 F.2d 645 (1st Cir. 1978)..... 12

Souza v. Southworth, 564 F.2d 609 (1st Cir. 1977)..... 10, 15

Taylor v. McKeithen, 407 U.S. 191 (1972)..... 8

United Handicapped Federation v. Andre, 622 F.2d 342 (8th Cir. 1980) 9

Virginia Railroad Company v. U.S., 272 U.S. 660 (1926)..... 10

Wharton v. Knefel, 562 F.2d 550 (8th Cir. 1977) 15

White v. New Hampshire Dept of Employment Security, 629 F.2d 697 (1st Cir. 1980) 10

Winton v. Amos, 255 U.S. 373 (1921)..... 8

Woe v. Nebraska State Department of Public Welfare, 608 F.2d 302 (8th Cir. 1979) 15

STATUTES AND RULES

Emergency School Aid Act of 1972, §718, 20 USC §1617 (1972) 13

28 U.S.C. §1254(1)..... 2

28 U.S.C. §1927..... 16

42 U.S.C. §1983..... *passim*

42 U.S.C. §1988..... *passim*

Rule 14, Eighth Circuit Court of Appeals..... 11

Rule 21.1(a), Rules of the Supreme Court..... 6

Rule 39, Federal Rules of Appellate Procedure 4, 15, 16, 17

Rule 52, Federal Rules of Civil Procedure 8

OTHER MATERIALS

ABA TASK FORCE ON APPELLATE PROCEDURE, EFFICIENCY AND JUSTICE IN APPEALS: METHODS AND SELECTED MATERIALS (1977) . 11

S. Rep. No. 94-1011. 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908 ..... 12, 16, 17

No. 79-1618

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October Term, 1980

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware corporation,

Petitioner,

vs.

RAYMOND KASSEL, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

Petitioner, Consolidated Freightways Corporation of Delaware [CF],[1] seeks review of an order of the Eighth Circuit denying attorneys' fees under 42 U.S.C. §1988. The order reads in its entirety as follows:

> "Bill of costs was filed by counsel for appellee. Response to appellee's bill of costs was filed by intervenor, Motor Club of Iowa. Appellants' resistance to appellee's bill of cost was also filed. The Court having considered this matter, it is now here ordered that costs of appellee, $131.40, be taxed to appellants.

[1]Consolidated Freightways Corporation of Delaware is a wholly owned subsidiary of Consolidated Freightways, Inc. Both Companies wholly own all of their subsidiaries, except for United Terminals, Ltd., which is 50% owned by NLI Corporation, a subsidiary of Time-D.C., Inc.

> Costs are collectible in the United States District Court for the Southern District of Iowa.
>
> It is further ordered that motion of appellee to tax disbursements and attorney's fees be and is hereby denied." (A. 24)

Petitioner timely filed a motion to vacate the order (A. 25). The Eighth Circuit order disposing of that motion reads in its entirety as follows:

> "The Court has considered appellee's [CF's] motion to vacate its order of January 16, 1980, and response thereto. It is now hereby ordered that appellee's motion be, and is hereby, denied." (A. 29)

No order or opinion has been rendered by the District Court on attorneys' fees. The Eighth Circuit was the first court to act on any claim for attorneys' fees. Before trial, the District Court had separated all claims related to attorneys' fees from the case-in-chief which came before the Eighth Circuit on appeal.

JURISDICTION

The order of the Court of Appeals for the Eighth Circuit was entered January 16, 1980. Petition for Certiorari was filed on April 15, 1980, and was granted on April 6, 1981. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§1983 Civil Action for Deprivation of Rights.

> "Every person who, under color of any statute, . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, . . . secured by the Constitution . . . shall be

liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

§1988 Proceedings in Vindication of Civil Rights.

". . . In any action or proceeding to enforce a provision of section[s] . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs.

STATEMENT OF CASE

The State of Iowa prohibited the operation of 65' twin trailers through Iowa but permitted their operation in, to, and from certain border cities. Consequently, interstate general commodity carriers were forced to divert 65' twin trailers from direct interstate routes through Iowa to routes around Iowa. In 1978, Consolidated Freightways Corporation filed suit in District Court against State officials responsible for enforcing the law, alleging that enforcement of the law was a violation of the Commerce Clause, the Fourteenth Amendment, and 42 U.S.C. §1983 (A. 6-13). CF sought a declaratory judgment, injunctive relief, and attorneys' fees. The District Court bifurcated trial, separating the issue of attorneys' fees. It has yet to rule on the question of attorneys' fees for the trial (A. 18).

After an extensive trial of the case in chief, the District Court ruled for CF, declaring the statute to be unconstitutional and enjoining its enforcement. The Eighth Circuit Court of Appeals affirmed the District Court,[2]

[2] *Consolidated Freightways v. Kassel*, 612 F.2d 1064 (8th Cir. 1979).

and this Court recently affirmed that decision.[3] Subsequent to the Eighth Circuit decision, Plaintiff submitted a Bill of Costs pursuant to Rule 39 and the instruction of the Clerk of the Eighth Circuit (A. 20-21). Included in the costs were the attorneys' fees associated with the appeal. A letter accompanying the Bill of Costs drew the Court's attention to the District Court's bifurcation of the attorneys' fee issue, noted that only those attorneys' fees associated with the appeal were included in the Bill of Costs,[4] and suggested that judicial economy would be served by remanding the attorneys' fee question to the trial court to be considered jointly with fees for the trial (A. 19).

Costs of $131.40 were granted by the Eighth Circuit, but attorneys' fees and associated disbursements were denied without explanation (A. 24). Plaintiff filed a Motion to Vacate the denial order and to remand the issue to the trial court or, in the alternative, to permit filing of briefs and affidavits (A. 25). The Motion to Vacate was denied, again without explanation (A. 29).

SUMMARY OF ARGUMENT

The question upon which a writ of certiorari was granted and the only question susceptible of review is whether the Court of Appeals must provide a statement of

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[3] *Kassel v. Consolidated Freightways*, 49 U.S.L.W. 4328, (1981).

[4] Rule 39, Federal Rules of Appellate Procedure requires that costs be filed within 14 days after entry of judgment to avoid waiver. 42 U.S.C. §1988 provides that reasonable attorneys' fees may be awarded "as a part of the costs."

its reasons for making an initial decision denying attorneys' fees under 42 U.S.C. §1988. Not all cases require statements of reasoning. This case does. The lack of a statement impairs this Court's ability to review the decision, deprives the litigants of basic fairness, and impairs judicial efficiency.

Statements of the reasons for decisions granting or denying attorneys' fees under the civil rights laws have been uniformly required of trial courts by the Courts of Appeals and by this Court when a Court of Appeals makes the initial determination.

The appropriate relief is remand to the Eighth Circuit with instructions to remand to the District Court for an initial determination of attorneys' fees at trial and on appeal. Absent special circumstances, the trial court is better able to make initial determinations regarding attorneys' fees, and review of that decision by an intermediate appellate court will protect this Court's docket.

ARGUMENT

I. *THE SOLE ISSUE BEFORE THE COURT IS WHETHER THE LOWER COURT MUST STATE ITS REASONING.*

This Court did not grant certiorari on the issue of whether the court below erred by denying attorneys' fees. The only issue before the Court is whether the court below erred by not stating the reasons for its decision on

attorneys' fees.[5] Without such a statement of reasons, review of this decision is impossible, and the very impracticality of review becomes the issue on appeal.[6]

The posture of this case requires this narrow limitation of the issue, even though there are a number of possible underlying issues of importance. This case is not before the Court in the normal sequence of events. There has been no hearing on the issue of attorneys' fees. There has been no opportunity for either party to introduce evidence on attorneys' fees. There has been no substantial briefing of the issues, and there have been no stated determinations of fact or law by any court.

The Circuit Court's denial of attorneys' fees gives no hint as to the reasons for denial. It is impossible to determine what issues are involved in that denial and what issues should be appealed. Petitioner can hypothesize at least ten possible grounds for the denial, any of which could have been expressed in a one paragraph opinion:

1. The issue of attorneys' fees on appeal should not have been presented to the Court of Appeals but should have been presented in the first instance to the District Court.

---

[5]Rule 21.1(a) of this Court confines the parties to this issue, as it is the question upon which certiorari was granted. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 177-178 (1938); *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, 357, n. 2 (1940); *Irvine v. California*, 347 U.S. 128, 129 (1954); *J. I. Case Co. v. Borak*, 377 U.S. 426, 428-429 (1964); and *Mayor v. Educational Equality League*, 415 U.S. 605, 623 (1974).

[6]We do not suggest that all cases require opinions, nor that any opinion required need be more than a sentence or two. We do contend that this case requires some statement of the Court's reasoning.

2. The Bill of Costs is an inappropriate vehicle to present attorneys' fees for consideration.

3. The Court of Appeals is without the trial court's power to award attorneys' fees under 42 U.S.C. §1988.

4. There is insufficient factual support for an award of attorneys' fees.

5. The fee request is excessive and is denied to discourage such claims.

6. The State and its officials are immune from awards of attorneys' fees.

7. 42 U.S.C. §1988 is inapplicable to cases involving property or commercial interests.

8. 42 U.S.C. §§1983 and 1988 are applicable, but there are special factual circumstances which would make an award of attorneys' fees unjust.

9. There are no constitutional rights cognizable under 42 U.S.C. §§1983 and 1988 in this case.

10. 42 U.S.C. §1988 requires a specific finding of discrimination.

There is case law opposing most of these grounds, but some are of first impression. The impossibility of treating all conceivable grounds for denial on appeal necessarily confines the issue to the question of whether the Court of Appeals should have stated the grounds for its decision.

II. *THIS COURT MUST REMAND TO PROTECT ITS POWER TO REVIEW.*

A. *The Power To Require An Opinion Is Inherent In The Power To Review.*

Even where no statute or rule requires an opinion, this Court has repeatedly reversed or vacated inadequately explained decisions it could not properly review.[7] The authority to do so is implied by the constitutional and statutory grants of reviewing authority, the inherent power to protect that authority from impairment, and the obligation to be fair to the litigants.

B. *The Power To Review Is Impaired By The Lower Court's Failure To State Reasons.*

Reviewing courts do not judge the evidence and decide cases. They review the decision below to determine that it was properly reached. To do that, they must know what the reasoning process of the lower court was, for the process and not the result frequently determines whether a case is affirmed or reversed. A decision which rests upon a close factual determination and proper application of the law should be affirmed. The same decision, if based upon a different factual conclusion and a misapplication

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[7]Rule 52 of the Federal Rules of Civil Procedure requires findings of fact and conclusions of law by federal trial courts in most instances. This court has required such findings prior to enactment of the rule, *Public Service Commission of Wisconsin v. Wisconsin Telephone Co.*, 289 U.S. 67, 69-71 (1933); *Panama Mail Steamship Co. v. Vargas*, 281 U.S. 670, 671-672 (1930); *Winton v. Amos*, 255 U.S. 373, 396 (1921); and has required them of state courts not bound by the rules, *Blackburn v. Alabama*, 354 U.S. 393, 393 (1957); *Minnesota v. National Tea Co.*, 309 U.S. 551, 555 (1940); *Honeyman v. Hanan*, 300 U.S. 14, 26 (1937); and of the Circuit Courts of Appeals to whom rule 52 is inapplicable, *Northcross v. Board of Education*, 412 U.S. 427, 428-429 (1973); *Taylor v. McKeithen*, 407 U.S. 191, 194 (1972).

of the law, should be reversed. Denial of access to the reasoning denies the power to review.

This case lacks any indication of the reasoning in the decision itself. It also lacks the circumstantial indications of the reasoning that a hearing, briefs by the parties, or a lower court decision could provide.[8] The original decision was based solely on a simple bill of costs (A. pp. 20-21) and a stark statement that Appellees objected (A. pp. 22-24). There are no clues to the basis of the denial.[9]

Review is also impaired by the failure to define the issues. That lack of definition makes review an arduous proposition for the Court and the litigants. The number of possible issues in this case makes the presence of the problem clear.

In addition, lower courts have no guidance in new unsettled areas such as the issue of attorneys' fees raised in this case. Here the precedent would be of immediate value. The District Court still must try the issue of attorneys' fees for the trial work. The unexplained denial by the Circuit Court can provide it with no guidance. Instead,

---

[8]The parties did file briefs on the Motion to Vacate, but no briefs were filed prior to the original decision. The later filed briefs cannot provide guidance as to the basis of the original decision.

[9]The lack of briefs or argument is not unusual. Though the Eighth Circuit requires District Courts to fully explain their reasons, it simultaneously awards attorneys' fees on appeal apparently *sua sponte* and without discussion of its own reasoning. *Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. (1980); *United Handicapped Federation v. Andre*, 622 F.2d 342 (8th Cir. (1980); *Kimbrough v. Arkansas Activities Assoc.*, 574 F.2d 423 (8th Cir. (1978); *Green v. Ten Eyck*, 572 F.2d 1233 (8th Cir. 1978); *Brown v. Bathke*, 566 F.2d 588 (8th Cir. 1977).

it merely adds a new issue to those that already exist — What is the meaning and effect of the Circuit Court decision?[10]

There is a final, more subtle effect upon the appellate process. In unsettled areas of law there is a delicate dialogue among the courts. This dialogue promotes both efficient judicial administration and consistent, effective development of the law. The lack of an opinion, however brief, deprives the judicial system of this necessary dialogue. Because the procedures surrounding attorneys' fees are particularly unsettled and involve divisions of effort between the appellate and district courts, that dialogue is of particular value here.[11]

C. *Failure To State Reasons Denies The Litigants Fairness.*

The Constitution may only grant litigants a limited right to appeal in civil cases, but it does guarantee them fundamental fairness in the conduct of such an appeal. Without a statement of reasons when significant issues are involved, a litigant is often unable to tell whether to proceed or not.[12]

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[10]The denial may not even be intended to be determinative in regard to appellate fees. If denial by the Eighth Circuit were based upon the desirability of an initial determination by the trial court, the trial court should not only decide the question of fees for trial work but entertain and join the question of fees for appellate work.

[11]Simple questions of procedure are unsettled, such as which court should award appellate fees, compare, *Souza v. Southworth*, 564 F.2d 609 (1st Cir. 1977) with *Donnell v. General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978), and whether they are a necessary part of a final judgment, *compare*, *White v. New Hampshire Dept. of Employment Security*, 629 F.2d 697 (1st Cir. 1980) *with Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980).

[12]"Unless an opinion indicating the grounds of the decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the appellate court." *Virginia Railroad Company v. U.S.*, 272 U.S. 660, 675 (1926).

If a losing party does appeal a multiple issue case without an opinion, he must dissipate the force of his appeal in a welter of possible legal issues and undetermined factual controversies. The reviewing court must base initial factual determinations on the paper record, depriving the litigants of the right to a live trial at which the credibility of the witnesses, an often decisive factor, may be judged. The appellee may be denied the proper advantage that factual determinations by the trial court in his favor would give him on appeal.

III. *THE COURTS HAVE HELD THAT ATTORNEYS' FEE DECISIONS REQUIRE A STATEMENT OF REASONS.*

A. Review Of Attorneys' Fee Awards Requires A Statement Of Reasons.

Not all appellate decisions require even abbreviated statements of reasons. A comprehensive definition of which decisions require articulation of the court's reasoning would be difficult, but need not be made in this case.[13] Decisions regarding attorneys' fees under the civil rights

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[13]The American Bar Association Task Force on Appellate Procedure has recommended:

"The question of whether the opinion should be published or not published is quite separate from the question of whether there shall be any opinion at all. The device of eliminating opinions entirely by what are in effect one word orders of the 'affirmed' or 'reversed' variety exists in some jurisdictions. Except for the simplest cases, this is not desirable; particularly in cases of a reversal there ought to be explanation which demonstrates that the law is a reasoned process." ABA TASK FORCE ON APPELLATE PROCEDURE, EFFICIENCY AND JUSTICE IN APPEALS: METHODS AND SELECTED MATERIALS, (1977), p. 115.

The Eighth Circuit provides by rule for affirmance without opinion of lower court decisions but requires citation to the rule which lists reasons for the affirmance, 8th Cir. R. 14.

laws clearly fall within the class of decisions requiring a statement of reasons.

In *Newman v. Piggie Park Enterprise, Inc.*, 390 U.S. 400 (1968), this Court held that attorneys' fees should be awarded under the Civil Rights Act of 1964, absent special circumstances. In enacting 42 U.S.C. §1988, Congress specifically intended that the *Newman* standard be applied to 42 U.S.C. §1988.

> "It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278 [enacted 42 U.S.C. §1988], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)." S. Rep. No. 94-1011, 94th Cong., 2d Sess., 4, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912.

The statute thus grants discretion to the trial court as to whether fees should be awarded, but also provides a rigorous standard for the exercise of that discretion. Fees may only be denied if there are "special circumstances." The combination of discretion and a standard for the exercise of that discretion necessitates a statement of reasons to determine whether the decision is proper.

The Circuit Courts of Appeals have held that decisions on attorneys' fees under the civil rights laws, whether granted or denied, must be accompanied by a statement of reasons. *Sargeant v. Sharp*, 579 F.2d 645, 647 (1st Cir. 1978); *McGowan v. King, Inc.*, 616 F.2d 745, 747 (5th Cir. 1980); *International Society for Krishna Consciousness, Inc. v. Anderson*, 569 F.2d 1027, 1029 (8th Cir. 1978); *Fountila v. Carter*, 571 F.2d 487, 496-497 (9th

Cir. 1978); *O'Neil v. City of Lake Oswego*, 642 F.2d 367, 371 (9th Cir. 1981). The Eighth Circuit itself has so held:

> "We are unable to determine from the District Court's order whether the court's denial of attorneys' fees was based on an erroneous belief that the Act [42 USC §1988] did not authorize an award of fees in this case, or whether it was an exercise of its discretionary power under the Act. We, therefore, reverse and remand the cause to the District Court . . ." *Kimbrough v. Arkansas Activities Association*, 574 F.2d 423, 427 (1978).

B. *This Court Has Held That A Court Of Appeals Must State The Reasons For Denial Of Attorneys' Fees.*

The precedent of this Court is consistent with the holdings of the Courts of Appeals. In *Northcross v. Board of Education*, 412 U.S. 427 (1973), a case identical in posture to this one,[14] the Court vacated a Circuit Court of Appeals decision on attorneys' fees and remanded the case for a statement of reasons;

> "In this case, the United States Court of Appeals for the Sixth Circuit denied petitioners' motion for an award of costs and attorneys' fees. The Court of Appeals did not, however, state reasons for the denial and it is therefore not possible for this Court to determine whether the Court of Appeals applied the proper standard in reaching this result.
>
> • • •
>
> Since it is impossible for us to determine whether the Court of Appeals applied the standard and, if so, whether it did so correctly, we grant the petition for certiorari, vacate the judgment

[14]The request for fees on appeal in *Northcross* was originally made to the appellate court pursuant to the Emergency School Aid Act of 1972, §718, a statute *in pari materia* with 42 U.S.C. §1983.

below insofar as it relates to the denial of costs and attorneys' fees, and remand to the Court of Appeals for further proceedings consistent with this opinion." *Northcross v. Board of Education*, 412 U.S. at 427-429 (1973) (Footnotes omitted).

VI. *Remand To The Circuit Court With Instruction To Remand To The District Court Is The Appropriate Relief.*

A. *The District Court Is Better Able Than The Appellate Court To Determine Attorneys' Fees.*

Normally the trial court can better determine attorneys' fees awards than the Circuit Court of Appeals, even when the fees include a determination of appellate fees. The trial court generally has better knowledge of the details of the case, will be better aware of the tactical decisions made and the need for them, and be more familiar with the efforts of counsel. Remand to the trial court will often permit consolidating the attorneys' fees for all phases of the case in one hearing and decision.

Initial determination by the trial court also allows appellate review prior to review by this Court.[15]

An appellate court is procedurally ill-suited to determine the facts necessary in fee awards. In *Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1970), this Court held that attorneys' fees on appeal in antitrust cases should normally be first determined by the trial court. All of the circuits, save for the Eighth Circuit, have generally adopted that position for civil rights attorneys' fee

[15]Routine awards of attorneys' fees by the Courts of Appeals would substantially increase the docket of this Court which would be the only available court of review. The volume of such cases and the responsibilities of this Court would prevent any review of many erroneous decisions.

awards for appeal of civil rights cases.[16] The Eighth Circuit has not.[17]

B. *Congress Did Not Intend The Courts Of Appeals To Initially Determine Attorneys' Fee Awards.*

It would be inappropriate to remand to the District Court if Congress had intended that attorneys' fees on appeal be decided initially by the Courts of Appeals. 42 U.S.C. §1988 provides that fees shall be awarded "as costs." Federal Rules of Appellate Procedure Rule 39(b) requires submission of a bill of costs to the Court of Appeals within 14 days of judgment. Read together, the

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[16]First Circuit: *Souza v. Southworth*, 564 F.2d 609 (1st Cir. 1977). Second Circuit: *Mid-Hudson Legal Services, Inc. v. G&U, Inc.*, 578 F.2d 34 (2d Cir. 1978), *on remand*, 465 F. Supp. 261 (S.D. N.Y. 1978); *Fitzpatrick v. Bitzer*, 455 F. Supp. 1338 (D. Conn. 1978), *on remand from* 427 U.S. 445 (1976). Third Circuit: *Prandini v. National Tea Co.*, 585 F.2d 47 (3d Cir. 1978). Fourth Circuit: *McManama v. Lukhard*, 616 F.2d 727 (4th Cir. 1980). Fifth Circuit: *Aware Woman Clinic, Inc. v. City of Cocoa Beach*, 629 F.2d 1146 (5th Cir. 1980); *Iranian Students Assoc. v. Edwards*, 604 F.2d 352 (5th Cir. 1979); *Gary W. v.State of Louisiana*, 622 F.2d 804 (5th Cir. 1980); *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980); *Johnson v. State of Mississippi*, 606 F.2d 635 (5th Cir. 1979). Sixth Circuit: *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). Seventh Circuit: *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3617 (U.S. 2/24/81) (No. 80-1039); *Bond v. Stanton*, 630 F.2d 1231 (7th Cir. 1980), *Dawson v. Pastrick*, 600 F.2d 70 (7th Cir. 1979). Ninth Circuit: *Fountila v. Carter*, 571 F.2d 487 (9th Cir. 1978). Tenth Circuit: *Gurule v. Wilson*, 635 F.2d 782 (10th Cir. 1980); *Love v. Mayor of Cheyenne*, 620 F.2d 235 (10th Cir. 1980); *Booker v. Brown*, 619 F.2d 57 (10th Cir. 1980). District of Columbia Circuit: *Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977), *on remand*, 443 F. Supp. 789 (D.D.C. 1978).

[17]*Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. 1980); *Adams v. United States*, 620 F.2d 1277 (8th Cir. 1980), *cert. denied*, 101 S.C. 88 (1980); *Crain v. City of Mountain Home, Arkansas*, 611 F.2d 726 (8th Cir. 1979); *Woe v. Nebraska State Department of Public Welfare*, 608 F.2d 302 (8th Cir. 1979); *Brown v. Bathke*, 566 F.2d 588 (8th Cir. 1977); *Wharton v. Knefel*, 562 F.2d 550 (8th Cir. 1977); *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978); *Green v. Ten Eyck*, 572 F.2d 1233 (8th Cir. 1978).

two could imply that attorneys' fees on appeal must be submitted initially to the Court of Appeals and an inference be drawn that Congress intended that the Court of Appeals initially determine appellate fees. Stated more generally, the question is whether Congress intended to embrace all of the rules, statutes, and case law developed on costs by using the phrase "as costs" in regard to attorneys' fees awards.

This Court has recently determined that Congress did not intend in 42 U.S.C. §1988 to incorporate other statutes regarding costs. *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980). In *Roadway*, the Court determined that 28 U.S.C. §1927 (providing awards of costs in certain cases) was not applicable to attorneys' fees under 42 U.S.C. §1988.

A close review of Rule 39 shows its provisions to be inconsistent with the congressional purpose of 42 U.S.C. §1988, thus strongly suggesting that Congress did not intend Rule 39 to be applicable to attorneys' fees under 42 U.S.C. §1988. Rule 39(a), for instance, contemplates equal treatment of taxation of the parties. Though §1988 does not on its face so provide, congressional history suggests different treatment of plaintiffs and defendants. S. Rep. 94-1011, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 5908, 5912. Rule 39(d) as it existed at the time of enactment of 42 U.S.C. §1988 provided for the taxation of the costs by the clerk. The 1979 amendment provided for objections to the Bill of Costs, but clearly contemplates as the norm a clerical matter involving no discretion. An award of attorneys' fees to the contrary will always require sub-

stantial exercise of judicial discretion. Moreover, if attorneys' fees under §1988 are to be regarded literally "as costs" for purposes of Rule 39, those attorneys' fees associated with the preparation of the record must be awarded by the trial court, Rule 39(e). Finally, Rule 39 only provides for awards after judgment, whereas Congress intended to permit awards *pendente lite* under 42 U.S.C. §1988, S. Rep. No. 94-1011, 94th Cong. 2d Sess. 5, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 5908, 5912.

The inconsistencies between Rule 39 and 42 U.S.C. §1988 strongly suggest that Congress did not intend Rule 39 to apply to §1988. Application of Rule 39 to §1988 is the only support that exists for inferring a congressional intent that the Circuit Court of Appeals initially determine attorneys' fees. Without it, judicial efficiency strongly supports an initial determination by the trial court in most cases, and certainly in this bifurcated action.

CONCLUSION

There may well be issues of substantial importance in this case, but the present posture only presents the single issue of whether the denial of attorneys' fees must have its reasoning stated. Remand will permit the other issues to be raised and argued by the parties and decided, not in the abstract, but in the context of the operative determined facts of an actual case. Remand will permit informed review of the issues.

Remand to the District Court will promote judicial efficiency. It will avoid the separate consideration by different courts of attorneys' fees for trial and attorneys' fees on appeal that wastes judicial time and invites the

mischief of contradictory decisions. It will discourage the practice of Courts of Appeals making initial decisions of attorneys' fees, a practice that inappropriately makes this Court a court of initial appeal.

Dated June 18, 1981.

Respectully submitted,

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No. 79-1618

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, A Delaware Corporation,
Petitioner,

vs.

RAYMOND KASSEL, ROBERT RIGLER, L. STANLEY SCHOELERMAN, DONALD GARDNER, JULES BUSKER, ALLAN THOMS, BARBARA DUNN, WILLIAM MCGRATH, JON MCCOY, CHARLES W. LARSON, EDWARD DICKINSON, RICHARD C. TURNER, and ROBERT D. RAY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

1. Whether, with respect to eligibility for attorney's fees under 42 U.S.C. §1988, a Dormant Commerce Clause challenge to a state statute is a suit to remedy a deprivation of "any rights, privileges or immunities secured by the Constitution" within the meaning of 42 U.S.C. §1983.

2. Whether a corporation may resort to 42 U.S.C. §1983 if it claims only that it has been deprived of a privilege or immunity of citizenship.

3. Whether, consistently with the Eleventh Amendment, attorney's fees may be awarded against a state in Dormant Commerce Clause cases absent any expression of intent by Congress to abrogate immunity.

4. Whether a ruling on the purely legal question of statutory authorization or eligibility for an award of attorney's fees is void if unaccompanied by a statement of reasons.

TABLE OF CONTENTS

	Page
Questions Presented	i
Constitutional Provisions Involved	1
Statement of the Case	2
Summary of Argument	5
Argument	7
I. The Dormant Commerce Clause Is A Constitutional Provision Structuring Our Federalism Rather Than A Provision "Securing" Any "Rights, Privileges Or Immunities" Within The Meaning Of 42 U.S.C. § 1983	7
A. Not Every State Law Which Violates The Constitution Deprives Individuals Of "Rights, Privileges Or Immunities."	8
B. Constitutional Provisions Structuring Our Federalism Do Not Secure "Rights, Privileges Or Immunities."	10
C. The Background To § 1983 Supports A Distinction Between Federalism Provisions And Provisions Protecting Individual Rights.	14
D. Dormant Commerce Clause Litigation Has Not Been Brought Pursuant To 42 U.S.C. § 1983.	17
E. Considerations of Policy Suggest That Inclusion Of Commerce Clause Challenges Within § 1983 Would Not Promote Its Objectives.	20

II. Congress Did Not Intend To Extend 42 U.S.C. § 1983 Beyond The Scope Of The Fourteenth Amendment To Claimed Violations Of Those Limitations Imposed Directly Upon The States By Article I Of The United States Constitution. 24

A. The Background To § 1983 Strongly Suggests It Should Not Be Extended To Art. I, § 10 Limitations. 24

B. Early Decisions Of This Court Declined To Extend § 1983 To Contract Clause Cases. 29

C. No Useful Purpose Would Be Served By Extending § 1983 To Contract Clause Cases. 34

III. Section 1983 Does Not Afford A Remedy To Corporations For Deprivations Of "Privileges And Immunities" Secured Only To Citizens Of The United States. 37

IV. The Eleventh Amendment Bars An Award Of Attorney's Fees Against A State In Dormant Commerce Clause Cases Absent A Congressional Expression Of Intent To Abrogate Immunity. 38

V. A Ruling On The Purely Legal Question Of Eligibility For Attorney's Fees Need Not Be Accompanied By A Statement Of Reasons. 41

Conclusion 46

TABLE OF AUTHORITIES

Cases

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Hans v. Louisiana, 134 U.S. 1 (1890) 32

Helvering v. Gowran, 302 U.S. 238 (1937) 44

Holt v. Indiana Mfg. Co., 176 U.S. 68 (1900) 19,33

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Maine v. Thiboutot, 448 U.S. 1 (1980) 8,9

Marshall v. Pletz, 317 U.S. 383 (1943)..... 45

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28 U.S.C. §1341 33

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42 U.S.C. §1983.....i,2,3,5,6,7,9,10,18,19,24,34

42 U.S.C. §1988 .....i,3,4,5,6,7,22,39

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS

CONSTITUTIONAL PROVISIONS INVOLVED

Article 1, §8 United States Constitution:

> The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes . . . .

Article 1, §10 United States Constitution:

> No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . .

Article 4, §2, United States Constitution:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Eleventh Amendment:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subject of any Foreign State.

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

In July 1978, Consolidated Freightways Corporation (hereinafter "CF") filed suit in the Southern District of Iowa seeking to enjoin enforcement by Defendant officials (hereinafter "Iowa") of §321.457(6), Iowa Code (1979), a statute which limited to 60 feet the length of twin-trailered vehicles which could operate on Iowa highways.

CF's Amended Complaint alleged jurisdiction under 28 U.S.C. §§1331, 1332, 1343, 2201 and 2202 and 42 U.S.C. §1983.

(A. 6). The Complaint pleaded causes of action for 1) placing undue burdens upon, and discriminating against, interstate commerce in violation of Art. 1, §8 of the United States Constitution 2) violation of the Fourteenth Amendment and 3) violation of 42 U.S.C. §1983, (A. 11-12). In addition to injunctive relief, CF prayed for reasonable attorney's fees. (A. 13).

Iowa's Answer denied CF's jurisdictional allegations (A. 14), denied that §321.457(6) violated the Commerce Clause, the Fourteenth Amendment or 42 U.S.C. §1983 (A. 16) and prayed the court to deny CF all relief requested. (A. 16).

Shortly before trial, the United States Magistrate entered an Order granting CF's Motion to Bifurcate the claim for attorney's fees from other issues in the case. (A. 18). After an extensive trial, the District Court declared Iowa's length limitation unconstitutional in part and enjoined its enforcement on interstate highways. The District Court found that the Iowa length limitation did not discriminate against interstate commerce but that its application to interstate highways did constitute an undue burden upon commerce. *Consolidated Freightways* v. *Kassel,* 475 F.Supp. 544, 551, 553 (S.D. Iowa 1979). No claim under the Fourteenth Amendment or §1983 was discussed. Nor did the court make any explicit jurisdictional findings. Iowa appealed to the Eighth Circuit and sought a stay of the injunction. The Eighth Circuit denied the stay and ultimately affirmed the ruling below. *Consolidated Freightways* v. *Kassel,* 612 F.2d 1064 (8th Cir. 1979).

At no time between the district court's ruling and the conclusion of the appeal did CF pursue its claim to attorney's fees in the district court. Shortly after the opinion by the Eighth Circuit, however, CF filed a brief document entitled "Bill of Costs" (A. 20-21) requesting "costs under 42 U.S.C. §1988," including "Attorney's fees" for the appeal in the amount of $41,911. CF did not accompany this Bill with a brief or memorandum attempting to support its eligibility for attorney's

fees or request oral hearing before the court. By letter to the clerk, CF suggested judicial economy would be served by remand to the district court (A. 19), but no motion seeking such relief was filed with the court.

Iowa filed a Resistance objecting "to any allowance of attorney's fees . . . under 42 U.S.C. §1988." (A. 22-23). On January 16, 1980, the Eighth Circuit entered an Order denying "the motion of appellee to tax disbursements and attorney's fees. . . ." (A. 24).

On January 25, 1980, CF filed a Motion to Vacate Order requesting that the denial of fees by the January 16, 1980, Order be vacated and CF's claim to fees be remanded to the district court. CF did not request an enlargement upon or elaboration of the January 16 Order. Nor did CF request a "Statement of Reasons" for the denial of fees. CF now alleged that "§1983 and §1988 are applicable" and filed a "Brief in Support of Motion to Vacate Order," which primarily relied upon *Corfield* v. *Coryell,* 6 Fed. Cas. 546, 552 (No. 3230) (C.C.E.D. Pa. 1823), for the proposition that the Privilege and Immunities Clause protects travel through a state for purposes of trade. No authority suggesting that §1983 reached all federal questions arising under the Commerce Clause or other provisions of Article I was provided the Court of Appeals.

Iowa again resisted, noting 1) that CF had selected this forum for determination of attorney's fees on appeal, 2) that §1983 and §1988 are not applicable, and 3) that the question of "special circumstances need not be addressed." (A. 27-28). On February 13, 1980, the Eighth Circuit denied CF's Motion to Vacate. (A. 29). The Petition for Certiorari was filed on April 15, 1980, and was granted on April 6, 1981.

SUMMARY OF ARGUMENT

I. A prevailing party in American litigation is not entitled to attorney's fees absent bad faith by the opposing party or a statute authorizing fee shifting. 42 U.S.C. §1988 authorizes fee shifting, as pertinent here, in cases for which 42 U.S.C. §1983 provides a cause of action. Section 1983 does not provide a cause of action whenever a constitutional issue is raised in a suit against a state official, but only when a "right, privilege or immunity secured by the Constitution" has been denied by conduct under color of law. The Commerce Clause of Article I, §8 does not secure "individual rights" in the constitutional sense, but rather allocates authority to the national government and, by negative implication, limits the police power of state governments. The 42d Congress did not intend to include Dormant Commerce Clause cases within §1 of the Civil Rights Act of 1871: 1) because it was drawn from criminal statutes which cannot be meaningfully applied to "violations" of the Commerce Clause, 2) because the Eleventh Amendment bars a damage remedy in cases involving state statutes and 3) because it was not needed to authorize injunctive relief. Inclusion of Dormant Commerce Clause claims within §1983 would accomplish only fee-shifting, a result that does not advance the purposes of §1988 and could befoul the "delicate adjustments" required by our Federalism.

II. Congress did not intend to extend 42 U.S.C. §1983 beyond the scope of the Fourteenth Amendment to claimed violations of those limitations directly imposed upon the states by Article I of the Constitution. The Contract Clause, the Ex Post Facto Clause and the Bill of Attainder Clause have not been "incorporated" by the Fourteenth Amendment, which §1983 was enacted to enforce. The legislative history of §1983 strongly suggests, and the early decisions of this Court confirm, that the 42d Congress did not intend to create a new remedy for Contract

Clause claims. Because these clauses may only be violated by legislative acts (rulemaking), inclusion of them within §1983 would also accomplish only fee-shifting under §1988. This analysis of the Contract Clause suggests, a fortiori, that Dormant Commerce Clause litigation should not be brought within §1983.

III. A corporation may not resort to 42 U.S.C. §1983 if it claims only a deprivation of a "privilege or immunity" of citizenship because corporations are not citizens.

IV. An award of attorney's fees in a Dormant Commerce Clause challenge to a state statute is barred by the Eleventh Amendment because there is no significant nexus between Section 5 of the Fourteenth Amendment and the Commerce Clause and because Congress has not in any manner indicated an intent to abrogate immunity in Commerce Clause cases. In any case, this Court should adopt a construction of 42 U.S.C. §1983/§1988 that avoids a substantial constitutional question concerning the application here of those statutes.

V. A statement of reasons is not essential to review of a determination of *eligibility* for fees, the question presented here, because that is a pure question of law an appellate court has plenary power to resolve. This Court may consider any issue fairly presented by the record urged by respondent in support of the ruling below. This Court may, therefore, affirm the Eighth Circuit's holding that CF is ineligible for fees without requiring an explicit statement of reasons.

ARGUMENT

I. The Dormant Commerce Clause Is A Constitutional Provision Structuring Our Federalism Rather Than A Provision "Securing" Any "Rights, Privileges Or Immunities" Within The Meaning Of 42 U.S.C. §1983.

Iowa contends that fee shifting in Dormant Commerce Clause cases has not been authorized by Congress. In the absence of such authorization, or bad faith by Iowa (which has not been alleged), the "American Rule" prohibits the award of attorney fees. *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975).

CF contended below that fee shifting is authorized in this case by the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Section 1988 authorizes fee awards, in the discretion of the court, in actions to enforce provisions of various civil rights acts, the only one of which pleaded below is 42 U.S.C. §1983. Section 1983 provides in pertinent part:

> Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any *rights, privileges or immunities secured by the Constitution* and laws, shall be liable to the party injured at law, suit in equity, or other proper proceeding for redress. [Emphasis added].

When a plaintiff claims a cause of action is grounded in §1983 a court must ask 1) whether the conduct complained of was taken under "color of state law" and 2) whether the conduct deprives a person of "rights, privileges or immunities secured by the Constitution and laws." *Parratt* v. *Taylor,* ____ U.S. ____, filed May 18, 1981, 49 U.S.L.W. 4509, 4511. Here, defendant state officials were limiting the length of vehicles which could travel Iowa highways by virtue of express legislative command

and thus were acting "under color of law" within the meaning of §1983. However, the Commerce Clause does not establish individual rights against government, but instead allocates power between the state and national government. The language of §1983, prior interpretations of the statute, the basic constitutional distinction between provisions protecting individual rights and provisions structuring federalism, the legislative history of §1983 and every consideration of policy point to the conclusion that the Dormant Commerce Clause is not a source of "rights, privileges or immunities secured by the Constitution."

A. Not Every State Law Which Violates The Constitution Deprives Individuals Of "Rights, Privileges Or Immunities."

The language employed by Congress in §1983, although broad, is not coextensive with the Constitution or the United States Code.[1] The "rights, privileges and immunities" language of §1983 is significantly less expansive than the language employed in the Judicial Article and in other jurisdictional statutes to authorize judicial consideration of every conflict between a state statute and federal law. For example, Article III, §2 provides: "The judicial power shall extend to all cases, in Law and Equity, *arising under this Constitution,* the laws of the United States . . . ." [Emphasis added]. And, only four years after adopting the Civil Rights Act of 1871, Congress conferred general federal question jurisdiction upon lower federal courts. 18 Stat. 470. What is now 28 U.S.C. §1331, in contrast to §1343(3), employs the terminology of Article III, §2. Similarly, §25 of the Judiciary Act of 1789 extended this Court's review by writ of er-

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[1] The language of 28 U.S.C. §1343(3), the jurisdictional counterpart of §1983, is narrower with respect to statutory rights, *Maine* v. *Thiboutot,* 448 U.S. 1 (1980), but the phrase "rights, privileges or immunities secured by the *Constitution*" is identical in both statutes and is to be given the same construction. *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 544 (1972).

ror to cases "where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repunant to the constitution, treaties or laws of the United States." 1 Stat. 73. This language, too, incorporates every conflict between state and federal law. See, *e.g.*, *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 289 (1921) (Commerce Clause challenge to state statute imposed as a defense to breach of contract).

This Court, moreover, has held that not every case "arising under" the Constitution falls within §1983. In *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 615 (1979), in upholding the argument that the Supremacy Clause of Art. VI, §2 does not alone "secure," and is not itself, a "right, privilege or immunity secured by the Constitution," this Court stated:

> Thus, while we recognize that there is force to claimants' argument that the remedial purpose of the civil rights legislation supports an expansive interpretation of the phrase "secured by the Constitution," it would make little sense for Congress to have drafted the statute as it did if it had intended to confer jurisdiction over every conceivable federal claim against a state agent. In order to give meaning to the entire statute as written by Congress, we must conclude that an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim "secured by the Constitution" within the meaning of §1343(3).

Just last term in *Pennhurst State School* v. *Halderman*, ____, U.S. ____, filed April 20, 1981; 49 U.S.L.W. 4363, 4370, this Court pretermitted the question whether §6011 and 6063 of the Developmentally Disabled Assistance and Bill of Rights Act may be enforced via 42 U.S.C. §1983, as interpreted in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), stating:

> Whether *Thiboutot* controls this case depends on two factors. First, respondents here, unlike the plaintiff in *Thiboutot* who alleged that state law prevented him from receiving federal funds to which he was entitled, can only claim that the state plan has not provided adequate "assurances" to the Secretary. *It is at least an open question whether an individual's interest in having a State provide those "assurances" is a "right secured" by the laws of the United States within the meaning of* §1983. [Emphasis added].

See also *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, ____ U.S. ____, filed June 25, 1981, 49 U.S.L.W. 4783, 4788.

Several lower federal courts have made the same point since *Thiboutot*. In *First National Bank of Omaha* v. *The Marquette National Bank of Minneapolis*, 636 F.2d 195, 198 (8th Cir. 1980, *cert. denied* ____ U.S. ____, April 7, 1981; 49 U.S.L.W. 3743, the court rejected a claim that the National Bank Act conferred a "right" to collect interest at the "most favored lender" rate, as the term "right" is employed in 42 U.S.C. §1983.

In *Meyerson* v. *Arizona*, 507 F.Supp. 859, 864 (D. Ariz. 1981), the district court rejected a claim that §1983 provides a cause of action for violation of §503 of the Rehabilitation Act of 1973, 29 U.S.C. §193 (Supp. II 1978), stating Iowa's position in succinct terms:

> Thus, before one can enjoy a right of action under §1983, one must establish a violation of a federally protected right independent of §1983. In order to have an action under §1983, it is not enough to establish the violation of a federal statute. Rather, the statute violated must be one that confers a federal right upon the plaintiff.

B. Constitutional Provisions Structuring Our Federalism Do Not Secure "Rights, Privileges Or Immunities."

The Commerce Clause, Art. I, §8, grants to Congress the power to regulate interstate commerce. Unlike the Supremacy Clause involved in *Chapman,* the Commerce Clause is a substantive grant of power to the national government. That grant of power, in part because of the Supremacy Clause, has been held negatively to imply a limitation upon the states. Thus, these two critical clauses order the distribution of power between state and nation in our federal system. Neither clause expressly and generally limits the power of government over individuals. Iowa contends that only those provisions limiting governmental power over individuals should be considered "rights, privileges or immunities" within the meaning of §1983.

In his recent book, *Judicial Review in the National Political Process* at 174-75 (1980), Prof. Jesse Choper bases an entire theory of judicial review on the distinction Iowa urges, which he articulates as follows:

> When a litigant contends that the national government (usually the Congress, but occasionally the executive, either alone or in concert with the Senate) has engaged in activity beyond its delegated authority, or when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern, the constitutional issue is wholly different from that posed by an assertion that certain government action abridges a personal liberty secured by the Constitution. The essence of a claim of the latter type—which falls into the individual rights category of constitutional issues, explored in chapter 2—is that no organ of government, national or state, may undertake the challenged activity. In contrast, when a person alleges that one of the federalism provisions of the Constitution has been violated, he implicitly concedes that one of the two levels of government—national or state—has power to engage in the questioned conduct. The core of the argument is simply that the particular government that has acted is the constitutionally improper one. To put it

> another way, a federalism attack on conduct of the national government contends that only the states may so act; a federalism challenge to a state practice asserts that only the central government possesses the exerted power; neither claim denies government power altogether.

Because Congress could enforce a 55-foot length limit for vehicles travelling interstate highways, CF does not have a constitutional "right" to operate 65-foot trucks, as the term "right" is traditionally employed in constitutional discourse.

Few distinctions in American constitutional law are more thoroughly accepted than that between provisions allocating power among branches of levels of government, on the one hand, and provisions protecting the individual from government on the other. The Commerce Clause in general, and Dormant Commerce Clause litigation in particular, are invariably classified by the textwriters and casebook authors as presenting a problem in federalism rather than a problem of individual rights.[2]

Commentators writing specifically on the Commerce Clause have employed a similar analytical framework. Justice (then Professor) Frankfurter makes the point in these terms:

> Two major issues have been the dominant concern of the Supreme Court throughout its history. Under shifting forms and with varying intensity, the Court has had to decide what belongs to the nation and what belongs to the states, under what circumstances may society intervene and when is the individual to be unrestricted.

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[2] See, *e.g.*, J. Nowak, *et al.*, *Constitutional Law* (1978) (*compare* Part II *with* Part III); B. Schwartz, *Constitutional Law* (2d ed. 1979) (*compare* ch. 4 *with* chs. 6-9); L. Tribe, *American Constitutional Law* (1978) (*compare* ch. 6 *with* ch. 7); P. Brest, *Processes of Constitutional Decision-making* (1975) (*compare* ch. 3 *with* ch. 7); P. Freund, *et al.*, *Constitutional Law* (4th ed. 1977) (*compare* Part II with Part III); G. Gunther, *Constitutional Law* (9th ed. 1975) (*compare* Part II *with* Part III).

F. Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* at 111-12 (1964 ed.).

And Professor Gavit states flatly:

> If the Commerce Clause is a jurisdictional dividing line between Congressional and state power to regulate the conduct and legal interests of those engaged in interstate or foreign commerce, what is the theoretical and practical result as far as those individuals are concerned?
>
> * * *
>
> The Commerce Clause created no rights or privileges; it established no law other than the law of jurisdiction to regulate those engaged in interstate or foreign commerce.

B. Gavit, *The Commerce Clause* at 32-33 (1932).

In his seminal article advocating an explicit balancing of state and national interests, Professor Dowling observed: "It is true that the litigation is between private parties, but the issue touches the relative jurisdiction of nation and state. After all, this is statecraft in which the courts are engaged." Dowling, *Interstate Commerce and State Power,* 27 Va. L.Rev. 1, 22-23 (1940).

Professor Tushnet echoes the theme in more contemporary jargon:

> Judicial review must be carefully coordinated with the operation of the political branches if democratic decision-making is to be protected. Questions arising under the dormant commerce clause illustrate the utility of a political theory of judicial review in which the focus of concern is the adequacy of the political branches to protect important interests. Indeed, a political theory may be the only one upon which dormant commerce clause doctrine can rest, for the institutional problems of federal-state relations,

> and the separation-of-powers issues associated with them, do not easily lend themselves to solution by attention to individual rights, the major competitor of the political theory, as a general justification of judicial review.

Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 Wis. L. Rev. 125, 165-66.

The language employed by this Court's decisions in Dormant Commerce Clause cases reflects the distinction Iowa urges. For example, Justice Jackson justified a result by invoking, not the need to protect the individual from government, but rather the "principle that our economic unit is the nation," a "federal free trade unit." *H.P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 539 (1949). That principle has been extremely important to our general economic welfare; it does not address the relationship between the individual and the state.

C. The Background To §1983 Supports A Distinction Between Federalism Provisions And Provisions Protecting Individual Rights.

This fundamental distinction between those Constitutional provisions which protect individual rights and those which structure governmental power is reflected in the debates of the Civil Rights Act of 1871. Rep. Shellabarger, a leading supporter of the Act, not only articulated the distinction clearly, he indicated that the Act was not concerned with enforcing the federalism provisions:

> My next proposition is historical, and one simply in aid and support of the truth of the first. It is that the United States always has assumed to enforce, as against the States, and also persons, every one of the provisions of the Constitution. Most of the provisions of the Constitution which restrain and directly relate to the States, such as those in the tenth section of first article, that 'no State shall make a treaty,' 'grant letters of marque,' 'coin money,' 'emit bills

> of credit,' & c., relate to the divisions of the political powers of the State and General Governments. They do not relate directly to the rights of persons within the States and as between the States and such persons therein. *These prohibitions upon the political powers of the States are all of such nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States 'enforced' these provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or liabilities of persons within the States, as between such persons and the States.*

Cong. Globe, 42 Cong., 1st Sess., App. 68 (1981) (hereinafter "*Globe App.*").

Representative Shellabarger proceeded to argue that the Act was needed to enforce the rights created by §1 of the Fourteenth Amendment, *Globe App.* at 70, and this Court has regularly stressed that §1983 was intended to remedy violations by states of those individual rights. See, *e.g.*, *Monroe* v. *Pape*, 365 U.S. 167, 171 (1916). The Fourteenth Amendment certainly created a new array of individual rights pro[illegible]ted against state as well as federal encroachment. But it is difficult even to articulate, much less defend, the proposition that the Fourteenth Amendment in some manner affected the meaning of the provisions of Article I allocating authority to the national government. It follows that §1983 was not intended to provide a cause of action for alleged violations of limitations on state power implied negatively from a grant of authority to the national government. Certainly there is nothing in the legislative history of §1983 which would suggest that the 42d Congress viewed either the Fourteenth Amendment or §1983 as at all concerned with the types of state police power legislation which forms the grist for the Dormant Commerce Clause mill.

The origin of §1983, on the other hand, strongly indicates that Congress would not have had Commerce Clause litigation in mind. Section 1 of the 1871 Act, now §1983, was derived from the Civil Rights Act of 1866 and its central purpose was to add a civil remedy against the denial of rights, the "willful" denial of which had previously been enforceable only by *criminal* prosecutions. See *Chapman* v. *Houston Welfare Rights Organization,* 441 U.S. 600, 610 at n. 25 (1979), citing Cong. Globe, 42d Cong., 1st Sess. 568. (1871) (remarks on Sen. Edmunds); id., App. 68 (remarks of Rep. Shellabarger). And, in *Monroe* v. *Pape,* 365 U.S. 167, 184-85 (1961), this Court held that the phrase "under color of law" should be construed identically with the same language in 18 U.S.C. §242, given that §242 also evolved from §2 of the Act.[3]

Iowa knows of no federal criminal prosecutions under 18 U.S.C. §242 for "wilfully burdening interstate commerce." Among other reasons that may be true is Dormant Commerce Clause cases, unlike search and seizure cases, appear always to involve challenges to state or municipal legislation or rulemaking. The claim is that the *enactment* of the *law* is *ultra vires* the state. Congress would not have contemplated putting members

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[3] It has also been urged that §1983 was modelled in part on §6 of the 1870 Civil Rights Act, 16 Stat. 144, later §508 of the Revised Statutes. *Chapman, supra* at 651-54 (White J. concurring).

18 U.S.C. §242 provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any *rights, privileges, or immunities secured or protected by the Constitution or laws of the United States,* or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life. (Emphasis added).

of a state legislature in jail for exceeding limits on its power implied from grants of power to the United States. See *Lake Country Estates* v. *Tahoe Planning Agency*, 440 U.S. 391 (1979); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951). If Commerce Clause litigation would not involve the denial of "rights, privileges or immunities secured by the Constitution" for purposes of 18 U.S.C. §242, it should not involve them for purposes of 42 U.S.C. §1983.

D. Dormant Commerce Clause Litigation Has Not Been Brought Pursuant To Section 1983.

Iowa's position is also supported by the consistent behavior of American lawyers. In over 100 years there have been almost no suggestions that §1983 provided a remedy for Dormant Commerce Clause cases or that 28 U.S.C. §1343(3) afforded federal jurisdiction for them. Rather, the practice until recently has been to seek only injunctive relief, to invoke 28 U.S.C. §1331, and to plead the required jurisdictional amount. Thus, writing in 1977, Prof. Moore would state:

> There remain some cases in which redress is sought against action taken under color of law in which the litigation must proceed under §1331 and the amount in controversy must be shown. Actions against federal officers constitute one example . . . . Another example is to be seen in actions challenging legislation as violative of the commerce clause. See, e.g., International Packers, Ltd. v. Hughes, 271 F.Supp. 430 (S.D. Iowa 1967).[4]

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[4] In *Hughes*, a three-judge court declared the Iowa Meat Labeling Act discriminatory against, and a burden upon, interstate commerce. The court specifically addressed the question whether the $10,000 amount in controversy requirement of §1331 jurisdiction had been satisfied, a problem which the attorneys would not have permitted to arise if they believed §1343(3) was even arguably applicable. See also *New York State Waterways Association, Inc.* v. *Diamond*, 469 F.2d 419, 421 (2d Cir. 1972).

1 *Moore's Federal Practice*, ¶0.62[2-2] at 666.

In *Connor* v. *Rivers*, 25 F.Supp. 937, 938 (N.D. Ga. 1938), the only such case discovered decided prior to 1970, a three-judge court dismissed for want of jurisdiction a commerce clause challenge to an act requiring the licensing of photographers, because the complaint did not allege $3,000 in controversy and because:

> Subsec. 14 of Sec. 41, Title 28 U.S.C.A. taken in connection with the history of the acts in the matter of civil rights, Title 24, R.S., and especially Sec. 1979, 8 U.S.C.A. §43, convince us that this Subsec. 14 does not give jurisdiction in this suit. *While there is an allegation about the Georgia statutes' interfering with the interstate commerce, it is clear that there is no claim or evidence that said Georgia Statute deprives the petitioner 'of any right, privilege, or immunity, secured by the Constitution of the United States,* or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons with the jurisdiction of the United States. (Emphasis added).

A LEXIS-aided search has revealed only two recent cases focussing directly upon whether 42 U.S.C. §1983 or 28 U.S.C. §1343(3) may be resorted to where the only constitutional claim alleged involves the Dormant Commerce Clause.[5] In *Confederated Salish & Kootenai Tribes* v. *Moe*, 392 F.Supp. 1297, 1305 (D. Mont. 1975) *aff'd* 425 U.S. 463 (1976),[6] the district

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[5] In addition, *Kennecott Corp.* v. *Smith*, 637 F.2d 181, 186 (3d Cir. 1980), suggests in a footnote, and as alternative ground for not applying 28 U.S.C. §2283, that a challenge to the New Jersey Corporation Takeover Bid Disclosure Act based on the Williams Act and the Commerce Clause could be brought pursuant to §1983.

[6] This Court noted that the district court found jurisdiction over the individual Indian plaintiffs on the basis of 28 U.S.C. §1343(3), but did not review the jurisdictional issue because all of the substantive issues could be reached by deciding the claims of the Tribe alone, over which the lower court clearly had jurisdiction. 425 U.S. at 475, n. 14.

court, as does Petitioner here, relied solely upon the dictum in *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549, n.16 (1972), that the phrase "rights, privileges or immunities secured by the Constitution and Laws" includes not only Fourteenth Amendment rights but [all of] the Constitution [and] laws of the United States," to conclude that an alleged violation of the Commerce Clause stated a claim under §1983. Of course, *Lynch* involved a due process and equal protection challenge to a statute authorizing summary pre-judicial garnishment, which a three-judge court had dismissed for want of jurisdiciton because the suit allegedly involved "property" rights rather than "personal" rights. *Lynch* addressed only whether §1983 was limited to some *subset of rights protected by the Fourteenth Amendment*. *Lynch* did not hold that §1983 embraces rights, privileges or immunities protected by Article I, see Division II, *infra*, much less that the Commerce Clause is a source of "rights" within the meaning of 42 U.S.C. §1983.

In *Czajkowski* v. *Illinois*, 460 F.Supp. 1265 (N.D. Ill. 1977), the other recent decision, Judge Marshall held that a Commerce Clause challenge to the Illinois Cigarette Tax Act brought by Indiana retailers, Illinois distributors and others could not be grounded in 42 U.S.C. §1983 and 28 U.S.C. §1343(3). After carefully reviewing *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), and noting that it distinguished rather than overruled three early decisions denying jurisdiction over actions to enjoin state taxes, *Carter* v. *Greenhow*, 114 U.S. 317 (1885), *Pleasants* v. *Greenhow*, 114 U.S. 323 (1885), and *Holt* v. *Indiana Mfg. Co.*, 176 U.S. 68 (1900), see Division II, *infra*, the court declined jurisdiction and quoted from Judge Friendly's opinion in *Eisen* v. *Eastman*, 421 F.2d 560 (2d. Cir. 1969):

> Later, Judge Friendly adds that:
>
> > It is quite hard to believe . . . that the framers either of §1 of the Civil Rights Act of 1871 or of its suc-

> cessors would have thought the statute could be invoked by a person complaining of state taxes allegedly barred by the Commerce Clause. 421 F.2d at 566.
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> Although these remarks are clearly *dicta,* and *Eisen* has been almost completely overruled by *Lynch,* they are especially pertinent to this case, since plaintiffs include a Commerce Clause claim in their §1983 allegations.

460 F.Supp. at 1278.

E. **Considerations Of Policy Suggest That Inclusion Of Commerce Clause Challenges Within §1983 Would Not Promote Its Objectives.**

Just because Commerce Clause cases involve "what belongs to the nation and what belongs to the states," rather than individual rights, inclusion of them within §1983 would serve no useful purpose and could well cause practical mischief.

If §1983 is not extended to cover Commerce Clause cases, individuals seeking to vindicate the national interest in a free market may resort to 28 U.S.C. §1331 and the established practice of this Court to enjoin the enforcement of unconstitutional statutes by state officials. See *Bell* v. *Hood,* 327 U.S. 678, 684 (1946); *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388, 400 (1971) (Harlan, J. concurring). Dellinger, *Of Rights and Remedies: The Constitution As a Sword,* 85 Harv.L.Rev. 1532, 1542-43 (1972). Certainly there have been many instances where state officials have been injoined in Dormant Commerce Clause cases without the slightest indication that §1983 had been pled or was necessary to afford a remedy. See, *e.g., Bibb* v. *Navajo Freight Lines,* 359 U.S. 520 (1959); *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, R.I.&.P.R.Co.,* 393 U.S. 129 (1968), *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970).

To Iowa's knowledge, no prevailing plaintiff in a Commerce Clause challenge has sought damages. much less been awarded

them. It seems unlikely that Congress would have regarded damages as appropriate in these cases and under present doctrine it appears that the damage remedy would accomplish either nothing or too much. Most Dormant Commerce Clause litigation involves challenges to *state* statutes. Because an award of damages against a state under §1983 is barred by the Eleventh Amendment, *Queen* v. *Jordan*, 440 U.S. 332, 334 (1979), and because the Commerce Clause is not susceptible of violation by government officials acting individually, damages would simply not be involved in the vast majority of cases. Put differently, Iowa contends that the Commerce Clause is a constitutional provision not "susceptible of violation by government officials acting individually." L. Tribe, *American Constitutional Law*, §18.4 (1978). Cf. *Ingraham* v. *Wright*, 430 U.S. 651 (1977).[7]

Under the recent decision in *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978), the occasional successful challenge to a city or county ordinance could conceivably generate damages. However, not only will the typical corporation plaintiff be in a superior position to spread any loss associated with the burdensome regulation, but municipalities may well be unduly "chilled" by the prospect of judgments which would dwarf[8] the typical award in litigation involving violations of individual rights.

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[7] In *Ingraham*, this Court addressed whether the Florida legal structure satisfied due process rather than whether the isolated acts of an individual school principal were constitutional. Prof. Tribe suggests that the requirements of just compensation and procedural due process are the best examples of norms addressed to legal *systems*. Rights protected by the First Amendment, the Fourth Amendment and the Equal Protection Clause, on the other hand, rather clearly may be violated by individuals. The proposition that limitations imposed directly on states by individuals by Art. 1, §10 are also not susceptible to violation by individuals is discussed in Division II, *infra*.

[8] In this case, the damages allegedly claimed by the potential class of plaintiffs amounted to $12,600,000. *Kassel* v. *Consolidated Freightways*, ____ U.S. ____ (filed March 24, 1981), 49 L.W. 4328.

Bringing the Commerce Clause within §1983 would have the effect of triggering attorney's fees under 42 U.S.C. §1988 in challenges involving state statutes, but that also appears unnecessary and possibly counterproductive. The purpose of providing attorney's fees for civil rights cases is to finance "private attorneys general" who would otherwise lack the wherewithal to seek legal vindication in the courts:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate those rights in court.

Senate Report No. 94-1011 at 3, as reprinted in 1976 *U.S. Code, Cong. Rec. & Admin. News* 5908.

That concern would seem to have no application to a plaintiff whose annual revenues approach $750,000,000* or to Commerce Clause plaintiffs generally. Nowhere in the legislative history of §1988 is there any suggestion that Congress was inclined to subsidize large corporate plaintiffs and a fair inference from that history is Congress in 1976 did not view Dormant Commerce Clause cases as falling within §1983. See generally *Source Book: Legislative History, Texts, and Other Documents,* Civil Rights Attorney's Fees Awards Act of 1976 (Public Law 94-559, S. 2278) (1976).

Moreover, Dormant Commerce Clause litigation involves the "delicate adjustment" of local and national interests, *Raymond Motor Trans. Inc.* v. *Rice,* 434 U.S. 429, 440 (1978). It seems undesirable to encourage the states to withdraw to a safe margin from potential burdens on interstate commerce in regulating in

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* *Consolidated Freightways* v. *Kassel,* Plaintiff's Trial Exhibit 46, p. 24 (Testimony of Robert E. Wrightson).

the interest of public health and safety. There may be little cost associated with providing "more process than is due" or more search warrants than would be strictly necessary; there may be significant costs associated with ineffectual health or safety standards.

Finally, this Court has stressed that a thorough ventilation of legislative fact issues is vital to Commerce Clause adjudication and has implicitly criticized a state Attorney General who chose not to present an extensive factual case. *Raymond Motor Trans. Inc.* v. *Rice,* 434 U.S. 429, 437, 444, 447 n. 25 (1978). Attorneys General would be sent contradictory signals, to say the least, if they were now told that the price of a vigorous, good faith, but unsuccessful defense is not only the state's out-of-pocket expenses but also fees of plaintiff's counsel running into hundreds of thousands of dollars.[10]

No court has yet awarded attorney's fees in a Commerce Clause case under §1988 or otherwise; Iowa urges this court to maintain that sensible practice.

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[10] As one source states:

> Too many state local governments simply lack the financial capacity to pursue expensive litigation, sometimes to the highest level, where the costs are likely to run into the hundreds of thousands of dollars.

American Council on Intergovernmental Relations, *Docket Book* at 126, 70th Meeting (June 19-20, 1980).

II. Congress Did Not Intend To Extend 42 U.S.C. §1983 Beyond The Scope Of The Fourteenth Amendment To Claimed Violations Of Those Limitations Imposed Directly Upon The States By Article I Of The United States Constitution.

Iowa contends above that Dormant Commerce Clause litigation does not involve "rights, privileges or immunities secured by the Constitution" because that phrase should not be extended to provisions that allocate authority between levels or branches of government. Article I, §10 of the Constitution on the other hand, does include express limitations on the states: the Contract Clause, the Ex Post Facto Clause and the Bill of Attainder Clause. These provisions, unlike the Commerce Clause, arguably fall within the literal language of §1983. However, because Congress was acting to enforce the Fourteenth Amendment when it enacted §1983, because it would not have occurred to Congress that additional remedies were needed, and because in practice §1983 would provide no additional remedies for Article I limitations, this Court has properly concluded that the 42d Congress did not intend to include them within the new federal cause of action afforded by §1983. Although this Court need not again address this issue to resolve the precise question at bar, Iowa would suggest that the history of Contract Clause litigation in particular illuminates the present issue and suggests, *a fortiori,* that Congress did not intend to include within §1983 the indirect benefits afforded interstate business by judicial recognition of the negative implications of the Commerce Clause.

A. The Background to §1983 Strongly Suggests It Should Not Be Extended To Art. I, §10 Limitations.

As noted in Division I above, §1983 was enacted pursuant to §5 of the Fourteenth Amendment for the purpose of enforcing the Fourteenth Amendment, *Monroe* v. *Pape,* 365 U.S. 167 (1961), and the scope of §1983 is coextensive with the scope of the Fourteenth Amendment:

> In the decade following *Screws*, the potential reach of section 1983 was considerably enlarged by the gradual incorporation of the guarantees of the Bill of Rights into the due process clause and the emergence of the modern equal protection and due process doctrines. Although section 1983 does not specifically encompass these provisions, the ambit of the statute is determined by that of the fourteenth amendment which it was enacted to enforce, and as the latter came to comprehend a wider variety of interests, the foundation for a broad interpretation of the civil rights acts was laid.

Developments in the Law, *Section 1983 and Federalism*, 90 Harv.L.Rev. 1133, 1169 (1977).

To our knowledge, it has never been suggested that the Fourteenth Amendment "incorporates" the rights protected by Art. I, §10. Indeed, such a suggestion would appear totally redundant. The reason the Bill of Rights requires total or selective "incorporation" is because, in terms, they are applicable only to the Federal government. The prohibitions of bills of attainder and ex post facto laws apply directly to the states by virtue of the original text, Art. I, §10, as well as to the Federal government, Art. I, §9.

The Contract Clause is an independent prohibition on the states alone and is not "a part of the 'centerpiece' of constitutional rights guaranteed and protected by the Fourteenth Amendment." *Poirier* v. *Hodges*, 445 F.Sup. 838, 842 (M.D. Fla. 1978) (Contract Clause does not create rights redressable under 42 U.S.C. §1983).

The legislative history of §1983 is certainly consistent with the view that its scope does not exceed the Fourteenth Amendment. Representative Bingham discussed the limitations on state legislative power in the original constitution in a manner which suggests his purpose was to provide for Fourteenth Amendment rights what had always been available for Article I limitations:

> Mr. Speaker, allow me to say, further, that by the text of the Constitution as you remember it, and as all thoughtful Representatives remember it, there are negative limitations upon the power of the States; as, for example, that no State shall make an *ex post facto* law; that no State shall pass any law impairing the obligation of contracts; that no State shall grant any title of nobility; that no State shall make anything a legal tender but gold and silver coin, that no State shall enter into any treaty alliance, or confederation, nor any compact or agreement with another State, or with a foreign Power, & c.
>
> *These are of the negative limitations on the power of the States in the original text of the Constitution. Does the gentlemen undertake to tell me that they have not always been enforced against State constitutions and State statutes, and the judgment of the highest courts of the States, in the Supreme Court of the United States, under the twenty-fifth section of the act of 1789?* Why, sir, if I were to read the decisions that have been made in the exercise of this very power, under that law, enforcing these negative prohibitions upon States, the sum would go down before I had read even a syllabus of the cases. [Emphasis added].

Globe App. at 83.

Rep. Bingham latter expressed his view of the scope of the "privileges and immunities," a remedy for the deprivation of which §1 of the Act was to provide. As author of the Fourteenth Amendment, he explained his principal objective was to overrule *Barron* v. *Baltimore,* 32 U.S. (7 Pet.) 243 (1833).

> Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said 'no State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts;' imitating their example and imitating it to the letter, I prepared the

provision of the first section of the fourteenth amendment as it stands in the Constitution, as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

I hope the gentleman now knows why I changed the form of the amendment of February, 1866.

Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States. Those eight amendments are as follows:

* * *

These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment.

Globe App. at 84.

Rep. Bingham went on to reemphasize that he was urging Congress to provide pursuant to §5 of the Fourteenth Amendment a remedy for the privileges or immunities, *i.e.* the Bill of Rights, guaranteed by §1 of the Fourteenth Amendment against state infringement, just as Congress had previously provided, via the Judiciary Act of 1789, a remedy for violation of limitations imposed upon the states by Art. 1, §10 of the "old" Constitution:

> The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full

> protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have already said, the States did deny to citizens the equal protection of the laws, *they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy.* They denied trial by jury, and he had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States, or combinations of persons?
>
> I respectfully ask my friend from Illinois [Mr. Farnsworth] to review all that he had said on this subject. *If I am not right in asserting that the negative limitations imposed by the Constitution on States can be enforced by law against individuals and States, then the Government was wrong from the administration of Washington down, and the Supreme Court of the United States was wrong every time this question has come before it.* [Emphasis added].

Globe App. at 85.

Other members of the 42d Congress clearly took a narrower view of the scope of §1 of the Fourteenth Amendment and thus of the "rights, privileges or immunities secured by the Constitution." See, *e.g.*, Remarks of Sen. Bayard, *Globe App.* at 243. Iowa knows of no suggestion, however, that Rep. Bingham's view was too narrow and that the Act under debate should be understood also to provide a new remedy for violations of limitations imposed by Art. I, §10 of the "old" Constitution.

B. Early Decisions Of This Court Declined To Extend §1983 To Contract Clause Cases.

The decisions of this Court directly and indirectly confirm the view that Contract Clause cases are not within §1983. As early as the *Civil Rights Cases*, 109 U.S. 3, 12-13 (1883), in explaining the conclusion that the Fourteenth Amendment, unlike the Thirteenth Amendment, extended only to "state action," this Court stated in passing that the Contract Clause addressed only one form of state action: *legislation* impairing the obligation of contracts:

> An apt illustration of this distinction may be found in some of the provisions of the original Constitution. Take the subject of contracts, for example; the Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by state legislation might be counteracted and corrected; and this power was exercised. The remedy which Congress actually provided was that contained in the 25th section of the Judiciary Act of 1789 [1 Stat. at L., 85], giving to the Supreme Court of the United States jurisdiction by writ of error to review the final decisions of state courts whenever they should sustain the validity of a state statute or authority alleged to be repugnant to the Constitution or laws of the United States. By this means, if a state law was passed impairing the obligation of a contract, and the state tribunals sustained the validity of the law, the mischief could be corrected in this court. The legislation of Congress, and the proceedings provided for under it, were corrective in their character. No attempt was made to draw into the United States courts the litigation of contracts

generally; and no such attempt would have been sustained. We do not say that the remedy provided was the only one that might have been provided in that case. Probably Congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a state law; and under the broad provisions of the Act of March 3, 1875, giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States, it is possible that such jurisdiction now exists. *But under that or any other law it must appear, as well by allegation as proof at the trial, that the Constitution had been violated by the action of the State Legislature. Some obnoxious state law, passed or that might be passed, is necessary to be assumed, in order to lay the foundation of any federal remedy in the case; and for the very sufficient reason, that the constitutional prohibition is against state laws impairing the obligation of contracts.* (Emphasis added).

Shortly thereafter, in *Carter* v. *Greenhow,* 114 U.S. 317 (1885), this Court squarely held that an action alleging a state statute impairs the obligation of contract does not come within §1983. Carter was the holder of bonds issued by the State of Virginia which stated on their face that they were receivable in payment of all taxes. Carter tendered these coupons in payment of property taxes to Greenhow, the Treasurer of the City of Richmond, who refused to accept them because a Virginia statute enacted subsequent to the issuance of the bonds required taxes to be paid in gold, silver, United States treasury notes or national bank currency. The Treasurer subsequently levied against Carter's property to obtain the $200 due in taxes. Carter apparently did not challenge the new statute in resistance to the levy, but rather brought an original action for damages in the United States Circuit Court.

This Court rejected the suit on two grounds. First, the opinion states that the Constitution does not secure a right to pay

taxes in coupons, in effect holding that the vice is in the enactment of the new legislation, which must be challenged directly by seeking an injunction against its enforcement, rather than indirectly by seeking damages for breach of contract from the Treasurer:

> That constitutional provision, so far as it can be said to confer upon, or secure to, any persons, any individual rights, does so only indirectly and incidentally. It forbids the passage by the States of laws such as are described. If any such are nevertheless passed by the Legislature of a State, they are unconstitutional, null and void. In any judicial proceeding necessary to vindicate his rights under a contract, affected by such legislation, the individual has a right to have a judicial determination, declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution. But of this right the plaintiff does not show that he has been deprived. He has simply chosen not to resort to it.

114 U.S. at 322.

Second, the opinion articulates the available remedies for challenging statutes which allegedly impair the obligation of contract:

> And the only mode in which that constitutional security takes effect is by judicial process to invalidate the unconstitutional legislation of the State, when it is set up against the enforcement of his rights under his contract. The mode in which Congress has legislated in aid of the rights secured by that clause of the Constitution, is, as is pointed out with clearness and fullness in the opinion of the court in the Civil Rights Cases, 109 U.S., 3-12 [Bk. 27, L.ed. 835-840], by providing for a review on writ of error to the judgments of the state courts, in cases where they have failed properly to give it effect, and by conferring jurisdiction upon the Circuit Courts by the Act of March 3, 1875,

> chap. 137, 18 Stat. at L.470 of all cases arising under the Constitution and laws of the United States, where the sum of value in dispute exceeds $500. Congress has provided no other remedy for the enforcement of this right.
>
> It might be difficult to enumerate the several descriptions of rights secured to individuals by the Constitution, the deprivation of which, by any person, would subject the latter to an action for redress under section 1979, Rev. Stats.: and, fortunately, it is not necessary to do so in this case. It is sufficient to say that the declaration now before us does not show a cause of action within its terms.

114 U.S. at 322-23.

Then, in *Hans* v. *Louisiana,* 134 U.S. 1 (1890), this Court reviewed a suit brought in the United States Circuit Court against the State of Louisiana by one of its citizens to recover the amount of coupons annexed to Louisiana bonds which had been effectively repudiated by an amendment to the state Constitution. After noting that *Ex parte Ayers,* 123 U.S. 443 (1887), had held that the Eleventh Amendment barred an identical suit by citizens of other states, this Court recognized sovereign immunity as a defense to a suit for damages against a state by one of its own citizens. The opinion reaffirmed, however, that the Eleventh Amendment was not a bar to review by this Court of state court judgments rejecting a defense based upon the Contract Clause. 134 U.S. at 19.

In *Pennoyer* v. *McConnaughy,* 140 U.S. 1 (1891), however, this Court made clear that the equity jurisdiction of the federal courts could be invoked to prevent acts by state officials which were authorized only by a statute violating the Contract Clause. The opinion attempted to draw a line for Eleventh Amendment purposes between damage actions and actions for specific performance on the one hand and injunctions against future actions by state officials on the other, a distinction quite similar to that drawn more recently in *Edelman* v. *Jordan,* 415 U.S. 651 (1974).

In *Holt* v. *Indiana Mfg. Co.*, 176 U.S. 68 (1900), this Court reaffirmed *Carter* v. *Greenhow*. Holt brought an action in federal court to enjoin the collection of taxes on capital stock, the value of which was derived from patent rights, claiming that rights granted by federal patents could not be subject to tax because of the Supremacy Clause and that the obligation of a contract between himself and the public had been unconstitutionally impaired. Holt asserted federal jurisdiction, *inter alia*, under what is now 28 U.S.C. §1343(3), but this Court again held that such a suit must be brought under the federal question provision, which then required $2,000 in controversy. The opinion contains dicta to the effect that due process and equal protection suits do not fit within §1343(3), which has been repudiated, but the holding has not been impaired.[11]

More recently, this Court has again recognized that equity actions under §1331 may be brought to enjoin a state officer from enforcing tax laws which impair the obligation of a contract derived from a legislatively granted corporate charter, subject to the restraint of 28 U.S.C. §1341, forbidding federal injunctions against the collection of a state tax if state law provides an ade-

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[11] Dicta in *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 542 at n. 6 (1972), attempted to confine *Carter* and *Holt* to constitutional challenges to the collection of state taxes. Appellees there had cited the cases in support of the "personal rights—property rights" distinction for civil rights jurisdiction rejected in *Lynch*, a proposition the cases supported at best obliquely. But *Carter*, as is demonstrated in the text, also had little to do with the collection of state taxes in the sense that prompted Congress to enact 28 U.S.C. §1341. *Carter* was a damage action for failure to honor public bonds in payment of taxes. Careful analysis suggests *Carter* is a fully viable precedent for the proposition that Article I rights are not within a statute designed to enforce the Fourteenth Amendment. And *Holt*, although in fact a challenge to collection of a state tax, was not decided on the ground that a *remedy* should be withheld, but rather on the ground that the federal courts lacked *jurisdiction* over Contract Clause challenges absent pleading of the jurisdictional amount required for general federal question jurisdiction.

quate remedy. *Georgia R. & Banking Co.* v. *Redwine,* 342 U.S. 299 (1952). And, in *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234 (1978), this Court held that an injunction should issue against the retrospective application of the Minnesota Private Pension Benefits Protection Act to an employer whose qualified pension agreement with its employees did not meet the statutory requirements.

C. No Useful Purpose Would Be Served By Extending § 1983 To Contract Clause Cases.

The teaching of this line of Contract Clause cases, in addition to two precise holdings that such cases do not come within 28 U.S.C. §1343(3) or 42 U.S.C. §1983, include the lesson that nothing of significance would be accomplished by including Contract Clause cases within §1983. The Contract Clause "is not applicable to mere individual conduct by persons acting under color state law." *Poirier* v. *Hodges,* 445 F.Supp. 838, 842 (M.D. Fla. 1978). See also *Ingraham* v. *Wright,* 430 U.S. 651 (1977); L. Tribe, *American Constitutional Law,* §18.4(1977); and discussion in Division I at p. ____, *supra.* Rather, the Contract Clause limits a state's legislative or rulemaking activity. Put differently, it is addressed to the legal system as a whole rather than to individual government officials. It follows that the damage action against state officials in their individual capacity generally available under §1983 would not be available in this class of cases. Similarly, this lesson also means that 18 U.S.C. §242, the criminal statute parallel in scope to §1983, would have no application to a "denial" of Contract Clause "rights." Again, it would seem to follow that if a class of cases could not be within the scope of §242, it should not be within the scope of §1983.

Third, the traditional equity power of federal courts affords appropriate injunctive relief in Contract Clause cases without the benefit of statutory authorization. Thus, resort to §1983 is not necessary to obtain the only relief that may otherwise be afforded in Contract Clause cases.

There is no reason to believe that any of this doctrine would have come as a surprise to the 42d Congress and thus it is even clearer that they would not have intended to include Art. I, §10 limitations within §1983. Indeed, nothing about the history of Art. I, §10 litigation, before or after the Civil War, suggests that Congress would have perceived, with respect to these rights, a need to provide a "remedy where state law was inadequate" or "a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Monroe* v. *Pape*, 365 U.S. 167, 173-74 (1961).[12]

Perhaps the only argument that would support a reading of §1983 broad enough to include rights guaranteed by Art. I, §10 would be the suggestion that *Maine* v. *Thibotout, supra* can be extended to cover this case. *Thibotout* held that the phrase "and laws" includes all laws intended by Congress to create rights and, unlike 28 U.S.C. §1343(3), is not limited to "equal rights laws." Because "laws" creating "rights" to welfare and to social security payments were enacted pursuant to Congress' Article I, authority rather than pursuant to §5 of the Fourteenth Amendment, it might be argued, "symmetry" requires inclusion of Art. I, §10 rights in the term "Constitution" in §1983. See *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 667 at n. 43 (White, J. concurring).

Several reasons in addition to the tenor of the legislative history argue against that extension. First, those who enacted and revised §1983 doubtless recognized that the content of the term "laws" would and should expand as time passed.

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[12] In this regard, it is also important to recall that the 42d Congress was well aware that the Contract Clause was vigorously enforced in the period before the Civil War. See, *e.g.*, *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810); *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819). See also *Developments, supra* at 1140; IC. Warren, *The Supreme Court in United States History*, ch. 11 (1922).

Although our Constitution may be "organic" rather than "static," existing provisions are plainly not subject to extension in the same sense that Congress may change "laws." Constitutional provisions and statutes, in other words, are not symmetrical for this purpose.

Second, the notion of "rights" secured by "laws" within the meaning of §1983 has not yet been extended beyond the protection of values related to the broad purpose of the Fourteenth Amendment. In one sense, of course, laws intended to provide at least a minimal level of subsistence are arguably presupposed by and derived from other constitutional rights. See *Chapman, supra* at 620. While prudence should caution against constitutionalizing a "right to minimum subsistence," the concept, as reflected in the term "laws," fits with the purpose of the Fourteenth Amendment. Indeed, when a statute-based liberty or property interest (entitlement) is created, a §1983 cause of action usually may be predicated upon due process or equal protection challenges to the state regulations or administrative practices in question. See, *e.g., Goldberg,* v. *Kelly,* 397 U.S. 254 (1970) (public assistance); *U.S. Dept. of Agri.* v. *Murry,* 413 U.S. 308 (1973) (foodstamps); *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) (parole); *Wolff* v. *McDonnell,* 418 U.S. 539 (1974) (good-time credit. So long as "rights" secured by federal "laws" do not extend beyond protection of those legislatively-created core interests which serve the contemporary functions the framers understood to be served by "liberty" or "property," see Reich, *The New Property,* 73 Yale L.J. 733 (1964), no serious violence is done to the intention of the framers of the Fourteenth Amendment or to the language of §1983. Extention of §1983 to the Contract Clause or to "rights" to "most favored lender" treatment, see *First National Bank of Omaha* v. *The Marquette National Bank of Minneapolis,* 636 F.2d 195 (8th Cir. 1980), or to a "right" to commence a tender offer within five days under the Williams Act, see *Kennecott Corp.* v. *Smith,* 637 F.2d 181 (3d Cir. 1980), would offend completely our sense of history and our common sense. Neither the language nor the history of

§1983, neither the purpose of the statute nor the decisions of this Court, require such a result.

III. Section 1983 Does Not Afford A Remedy To Corporations For Deprivations Of "Privileges Or Immunities" Secured Only To Citizens Of The United States.

Section 1983 provides a remedy to "any citizens of the United States or other person within the jurisdiction thereof . . . ." Corporations have been deemed "persons" and may assert any rights available to all persons lawfully within the United States. It is well-settled, however, that corporations are not "citizens." *Paul* v. *Virginia,* 75 U.S. (8 Wall.) 168, 177 (1869); *Hague* v. *CIO,* 307 U.S. 496, 514 (1939). Corporations, therefore, cannot invoke §1983 to remedy violations of privileges or immunities secured by Art. IV, §2 to citizens of each state, or by §1 of the Fourteenth Amendment to citizens of the United States. Thus, to the extent CF invokes a claim under the Privileges or Immunities Clauses, it is not eligible for attorney's fees under §1988.

Iowa contends, of course, that no "person" has any "rights, privileges or immunities" arising out of the Dormant Commerce Clause. Because CF has declined to elaborate upon its theory for inclusion of Dormant Commerce Clause cases within §1983 either to the Eighth Circuit or to this Court, Iowa is at something of a loss to respond to its claimed eligibility for fees. This argument is included here only because in the court below CF did cite to *Corfield* v. *Coryell,* 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1823), for the proposition that the Privileges and Immunities Clause of Art. IV, §2 conferred "The right of a citizen of the state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; . . . ."

The *Corfield* theory is available only to citizens and thus not to CF, but Iowa would briefly note other difficulties with the

theory. First, §1983 was intended to enforce §1 of the Fourteenth Amendment and thus is limited to the privileges and immunities of *national* citizenship. *Slaughterhouse Cases,* 83 U.S. (16 Wall.) 36 (1873).

Second, even if Art. IV, §2 claims could be invoked under §1983, that Clause only requires a state to extend to noncitizens benefits conferred upon citizens, absent a substantial reason for differential treatment. See *Toomer* v. *Witsell,* 334 U.S. 385, 396 (1948); L. Tribe, *American Constitutional Law,* §6-33 (1978). The District Court explicitly found that the Iowa length limitation did not discriminate against out-of-state interests. *Consolidated Freightways* v. *Kassel,* 475 F.Supp. 544, 553 (S.D. Iowa 1979). CF was not, therefore, denied any privilege or immunity afforded Iowa citizens.

Third, the Iowa length limitation in no meaningful sense infringed upon any "right to pass through" Iowa. The length limitation did not operate at Iowa's borders; intrastate doubles carriers were required to abide by the length limit as well. Moreover, if a length limit is considered to infringe a right to pass through Iowa, then so must Iowa's regulation of vehicle speed, height, width and weight, and every safety regulation which imposes a cost upon carriers. This Court did not strike down Iowa's length limitation on the ground that it *excluded* traffic. *Consolidated Freightways* v. *Kassel,* ____ U.S. ____, filed March 24, 1981; 49 U.S.L.W. 4328. CF's claim was rather that length limitations imposed inefficiencies on its operation which were insufficiently justified by safety concerns. Neither *Corfield* v. *Coryell* in particular, nor the Privileges and Immunities Clause in general, supports CF's claim to attorney's fees.

IV. The Eleventh Amendment Bars An Award Of Attorney's Fees Against A State In Dormant Commerce Clause Cases Absent A Congressional Expression Of Intent To Abrogate Immunity.

Iowa contends that, were this Court to conclude that the language of §1988 authorizes attorney's fees in Dormant Commerce Clause challenges to state statutes, the Eleventh Amendment would bar the award of attorney's fees in this class of case. In the absence of some manifestation of Congressional intent to override the State's immunity, *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), or an express or implied waiver of immunity by a state, *Parden* v. *Terminal Railway*, 377 U.S. 184 (1964), this Court has declined to approve financial payments from state treasuries that would significantly impact on a state's fiscal planning process. *Edelman* v. *Jordan*, 415 U.S. 651 (1974). Here, there is no statement at all in the text or the legislative history of 42 U.S.C. §1988 suggesting that Congress wished to impose attorney's fees in Article I cases and no basis for finding waiver. Should this Court hold that CF is eligible for fees, CF will, extrapolating from the $40,000 they sought for appellate work, seek an award in the hundreds of thousands of dollars. Requests for substantial awards will not be unusual in Commerce Clause cases because of the complex questions of legislative fact frequently involved.

In *Hutto* v. *Finney*, 437 U.S. 678 (1978), this Court upheld the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, as applied to a prison conditions case brought pursuant to the Eighth Amendment and §1983. This Court found, outside the four corners of the statute, evidence of legislative intent to abrogate immunity sufficient for Eleventh Amendment purposes when Congress is legislating pursuant to §5 of the Fourteenth Amendment. *Id.* at 693-94. In the alternative, this Court relied upon Congress' characterization of attorney's fees as recoverable "costs" relating to the expenses of litigation and held them outside the limitations of the Eleventh Amendment. *Id.* at 695-96.

In *Maher* v. *Gagne*, 448 U.S. 122 (1980), this Court upheld §1988 as applied to a challenge to AFDC regulations based upon the Social Security Act and the Fourteenth Amendment. This

Court held that the plaintiff, who had prevailed on her statutory claim, could be awarded fees because the constitutional claims were themselves sufficiently substantial to support federal jurisdiction. *Id.* at 130. Expressly reserved was the question "whether a federal court could award attorney's fees against a state based on a statutory, non-civil rights claim." *Id.*

Although Dormant Commerce Clause cases are "constitutional" rather than statutory, they are significantly farther removed from the purposes of the Fourteenth Amendment than is welfare litigation. For purposes of argument, we may assume that Congress could have abrogated immunity in this case pursuant to its Art. I, §8 powers. Plainly, it has not done so. There simply is an insufficient nexus between the clauses for Congress to abrogate immunity in Commerce Clause cases pursuant to §5 of the Fourteenth Amendment. Thus, the *Fitzpatrick* v. *Bitzer* basis of the holding in *Hutto* is not available here.

Attorney's fees may be awarded here only if, as "costs," they are beyond the purview of the Eleventh Amendment. Iowa cannot determine from *Hutto* and its progeny whether a majority of this Court subscribes to the "attorney's fees as costs" rationale and would, in any case, urge its reconsideration.

Although attorney's fees clearly bear some connection with other expenses of litigation, this case illustrates that attorney's fees often dwarf the other expenses and, indeed, the cost of implementing any prospective relief ordered. They may be a substantial, unanticipated drain on a state's budget. Substantial attorney's fees also serve, in effect, to punish a state for enacting a statute or, at least, for defending it in good faith. Indeed, that may be a legitimate purpose of §1988 in the true civil liberties, civil rights context. But Congress has an important role to play in defining our Federalism. While Congress has expressed its intention to place its finger on the scales on the side of individual rights, it has not expressed a similar intention to weigh in on the side of interstate business as the "delicate adjustment" of local and national interests in our Federalism is made by this

Court. Before the values of federalism fostered by the Eleventh Amendment are cast aside in Commerce Clause cases, this Court should require at least some expression from Congress that it wishes that done.

Finally, Iowa would note the familiar rule that statutes should be construed to avoid significant constitutional questions. At first blush it may appear difficult to apply that rule here because §1988, the statute whose constitutionality as applied would be in question, borrows from §1983 and it is the scope of §1983 which determines whether the constitutionality of §1988 will arise. However, as we demonstrate above, because the only operational consequence of bringing Commerce Clause case within §1983 would be to make prevailing plaintiffs eligible for fees under §1988, the rule should be fully applicable here. In any event, the questions addressed in earlier divisions of this brief are logically prior to the Eleventh Amendment issue and the latter need not be reached, if, as Iowa contends, Commerce Clause challenges fall outside §1983.

V. A Ruling On The Purely Legal Question To Eligibility For Attorney's Fees Need Not Be Accompained By A Statement of Reasons

CF complains that the Eighth Circuit was obligated to express formally its reasons for denying attorney fees and that this is the only issue which this Court may now consider. Iowa submits that the basis of the Eighth Circuit's decision may be easily inferred, but that the decision should be affirmed if Iowa was correct in urging below that §1983 should not be extended to Dormant Commerce Clause cases, irrespective of whether that was the unstated reason for the ruling.

CF suggests that in the absence of an explicit statement of reasons, this Court cannot discern the basis for denying fees below. In the Brief for Petitioner at pp. 6-7, CF conjures up ten (10) possible grounds for the denial of attorney's fees. Several of the "possible" grounds are either plainly inconsistent with 42 U.S.C. §1988 or have been expressly rejected by this Court. The

only remaining ground that would justify a *total denial* of attorney's fees, as opposed to a remand to the district court, is the ground that CF is entitled to no fees because Dormant Commerce Clause cases do not fall within §1983. The ground, and the only ground, urged by Iowa in this Court and in the court below is that CF was not eligible for any fees because this case is not within §1983 and, therefore, not within §1988. CF cannot be genuinely puzzled about the basis upon which fees were denied below.

Even if one could not discern the actual reason for the total denial of fees by the Eighth Circuit, effective appellate review does not require a statement of reasons here. To the extent Iowa presented below as a reason for denial of fees a purely legal theory upon which this Court is the final authority, this court may review the correctness of the ruling below.

As a general matter, issues concerning fee-shifting fall into three principal categories: 1) whether there is statutory authority to depart from the "American Rule," (eligibility); 2) whether "special circumstances" warrant the denial of fees to a prevailing party (entitlement); and 3) the amount of fees to be awarded to an eligible and entitled party. The questions of "entitlement" and amount are by statute and by decision committed to some degree to the sound *discretion* of the trial court

and the appellate courts review only for abuses of that discretion. Admittedly, it will be difficult to review a discretionary judgment if the underlying rationale is not explained. Iowa does not dispute the proposition that, at least as a prudential matter, a trial court should ordinarily state for the record the basis for exercising its *discretion.*[13] All of the authority cited by CF relates to the categories of "entitlement" and amount, not to the category of "eligibility."[14]

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[13] In *Sumner* v. *Mata,* ____ U.S. ____, filed Jan. 21, 1981; 49 U.S.L.W. 4133, this Court required federal district courts in habeas corpus proceedings to state for the record the grounds for rejecting the "presumption of correctness" of state court factual determinations set forth in 28 U.S.C. §2254(d). This requirement was imposed in a context where the lower courts were examining questions of fact or applying the "standards" of §2254(3) to a state court record (a "mixed" question of law and fact). This Court did not require a statement of reasons in the context of statutory construction, which is the context in which this case appears. A reasoned elaboration is always desirable, but practical considerations sometimes dictate *summary* disposition of legal questions. See Rules 16.7 and 23.1, Rules of the Supreme Court of the United States, (1980); Rules 9 and 14, Local Rules, Eighth Circuit Court of Appeals (1978).

[14] On pages 12 and 13 of Brief for Petitioner, CF cites six courts of appeal decisions for the proposition that statements of reasons for granting or denying fees must be provided. In all of the cases cited, the issue was what Iowa has labelled either "entitlement" or "amount." As the parentheticals that follow make clear, none involved the question of eligibility under §1988. *Sargeant* v. *Sharp,* 579 F.2d 645, 647 (1st, Cir. 1978) ("entitlement," "special circumstances"); *McGowan* v. *King, Inc.* 616 F.2d 745, 747 (5th Cir. 1980) (amount); *International Society for Krishna Consciousness, Inc.* v. *Anderson,* 569 F.2d 1027, 1029 (8th Cir. 1978) (issue of "entitlement," but no requirement that district court state reasons); *Fountila* v. *Carter,* 571 F.2d 487, 496-97 (9th Cir. 1978) (amount); *O'Neil* v. *City of Lake Oswego,* 642 F.2d 367, 371 (9th Cir. 1981) (amount); *Kimbrough* v. *Arkansas Activities Ass'n.,* 574 F.2d 423, 427 (8th Cir. 1978) ("entitlement," "special circumstances"). In *Kimbrough,* the Eighth Circuit properly decided the "eligibility" question itself and remanded only on the "entitlement" issue.

The question of "eligibility" which Iowa urged below and urges in this Court should be resolved against CF, is a pure question of law upon which this Court owes no deference to the unique position or expertise of a finder of fact. A lower court ruling on a pure question of law is not upheld only to the extent that the court states the correct reasons for its ruling. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943); *Helvering* v. *Gowran*, 302 U.S. 238, 245-46 (1937). A lower court is upheld if it can be determined by the appellate court that the result below should be the same as it was previously. It is the *decision, ruling* or *order* which must be correct. Whether the reasoning must be correct is important if but only if a reviewing court cannot determine the former without determining the latter.

For example, if Party A objects to the admissibility of Party B's documentary exhibit as privileged *and* as hearsay and the trial court simply rules — "sustained," an appellate court will affirm a judgment for Party A if *either* objection was well-founded. It is not decisive for appellate purposes that the trial court did not state a reason for the ruling. Indeed, it would not be grounds for reversal if the trial court had excluded the evidence because he incorrectly concluded it was privileged if the appellate court concludes the evidence was inadmissible hearsay.

For similar reasons, CF's suggestion that the "Question Presented" in their Petition for Certiorari precludes consideration of their eligibility for fees is plaintly groundless. While the "Questions Presented" limits the scope of petitioner's attack on the ruling below, it is obviously settled that a respondent may defend the ruling below on any ground fairly presented by the record.

In *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 at n. 8 (1977), this Court considered an issue urged by respondent company not encompassed within the Government's petition for certiorari "because the prevailing party may defend

a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." Similarly, in *Ryerson* v. *United States,* 312 U.S. 405, 408 (1940), although the court below had erroneously concluded that trusts were "persons" when gifts were made within the meaning of §504(6) of the Internal Revenue Code, the Government was permitted to justify the judgment in its favor on the ground that the gifts in question were within the exclusion for future interests. See also *Dandridge* v. *Williams,* 397 U.S. 471, 475 at n. 6 (1970); *Marshall* v. *Pletz,* 317 U.S. 383, 390 (1943); *Texarkana* v. *Arkansas Louisiana Gas Co.,* 306 U.S. 188, 198 (1939); *Langnes* v. *Green,* 282 U.S. 531, 539 (1931).

Finally, CF stresses that district courts are better suited than courts of appeal for making the initial determinations of entitlement to and the amounts of fees and urges this Court simply to remand the entire fee question to the district court.

Of course, in two important senses, the "preferable court" issue is not the primary issue before this Court. First, *CF asked the court of appeals,* not the district court, to award it fees and that request was for a specified dollar and cents amount. CF did not move to remand until its initial application for fees was denied. Had the Eighth Circuit awarded CF fees in the amount requested, CF would not be here questioning the court's authority to do so.

Second, if this Court were to determine that CF is eligible for fees, the ordinary procedure would be to remand to the Court of Appeals for further proceedings, including determination of the appropriate forum for resolution of any remaining issues. However, for the reasons set forth above, the Eighty Circuit correctly ruled that CF was ineligible for §1988 attorney's fees. To affirm, this Court need only concur in that ruling on a question of law. No remand to either court for a statement of reasons is required.

CONCLUSION

The ruling of the Court of Appeals denying attorney's fees should be affirmed.

Respectfuly submitted,

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No. 79-1618

IN THE

Supreme Court of the United States

October Term, 1981

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware Corporation,

Petitioner,

vs.

RAYMOND KASSEL, ROBERT RIGLER, L. STANLEY SCHOELERMAN, DONALD GARDNER, JULES BUSKER, ALLAN THOMS, BARBARA DUNN, WILLIAM McGRATH, JON McCOY, CHARLES W. LARSON, EDWARD DICKINSON, RICHARD C. TURNER, and ROBERT D. RAY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

ARGUMENT

I. THE ONLY ISSUE PROPERLY BEFORE THIS COURT IS THE REFUSAL OF THE COURT OF APPEALS TO GIVE A REASON FOR ITS DECISION 1

A. RESPONDENTS' BRIEF VIOLATES THE RULES OF THIS COURT 1

B. IOWA'S BRIEF ILLUSTRATES WHY A LOWER COURT OPINION IS NECESSARY . 2

C. THIS COURT SHOULD CONSIDER ONLY THE QUESTION PRESENTED 4

II. THE CONSTITUTION SECURES THE RIGHT OF CITIZENS TO ENGAGE IN INTERSTATE COMMERCE FREE FROM IMPROPER STATE REGULATION 4

A. THE CONSTITUTION DOES NOT CREATE RIGHTS 4

B. THE RIGHT TO ENGAGE IN INTERSTATE COMMERCE IS SECURED BY THE CONSTITUTION 6

III. SECTION 1983 APPLIES TO VIOLATIONS OF THE COMMERCE CLAUSE 8

A. COMMERCE CLAUSE CASES ARE WITHIN THE PLAIN LANGUAGE OF §1983 8

B. THIS COURT HAS NO PRECEDENT FOR DENYING §1983 COVERAGE TO THE RIGHT TO ENGAGE IN INTERSTATE COMMERCE 8

C. EVEN WERE RESPONDENTS' ANALYSIS CORRECT, §1983 WOULD BE VIOLATED 14

IV. SOUND POLICY SUPPORTS THE APPLICATION OF 42 U.S.C. §1983 AND §1988 TO COMMERCE CLAUSE CASES ... 15

A. THE POLICY CONSIDERATIONS BEHIND 42 U.S.C. §1988 ARE STRONGLY PRESENT IN COMMERCE CLAUSE CASES 15

B. IF THIS COURT HOLDS THAT §1983 DOES NOT APPLY TO COMMERCE CLAUSE RIGHTS, IT WILL JEOPARDIZE FIRMLY ESTABLISHED CONCEPTS OF STANDING, STATUTORY INTERPRETATION, AND INDIVIDUAL ACCESS TO THE NATIONAL ECONOMIC SYSTEM 18

CONCLUSION 19

TABLE OF AUTHORITIES

CASES CITED **Page**

Barrett v. City of New York,
323 U.S. 14 (1914) 8

Buck Stove & Range Co. v. Vickers,
226 U.S. 205 (1912) 7

Carter v. Greenhow,
114 U.S. 204 (1885) 10, 11, 12

Chapman v. Houston Welfare Rights Organization,
441 U.S. 600 (1979) 11, 13

The Civil Rights Cases,
109 U.S. 3 (1883) 12

Confederated Salish & Kootenai Tribes v. Moe,
392 F. Supp. 1297 (D. Mont. 1975), affirmed
on other grounds 425 U.S. 463 (1976) 9

Consolidated Freightways v. Kassel,
475 F. Supp. 544 (1979) 16, 17

Crutcher v. Kentucky,
141 U.S. 47 (1891) 7

Czajkowski v. Illinois,
460 F. Supp. 1265 (N.D. Ill. 1977) 9

Dandridge v. Williams,
397 U.S. 471 (1969) 2

Furst v. Brewster,
282 U.S. 493 (1931) 7

Garrity v. New Jersey,
385 U.S. 493 (1967) 7

Gibbons v. Ogden,
22 U.S. (9 Wheat.) 1 (1824) 5, 6

Grosjean v. American Press Co.,
297 U.S. 233 (1936) 7

H. P. Hood v. Du Mond,
336 U.S. 525 (1949) 6, 7

Heart of Atlanta Motel v. United States,
379 U.S. 241 (1964) 10

Holt v. Indiana Mfg. Co.,
176 U.S. 68 (1900) 11

Hughes v. Alexandria Scrap Corp.,
426 U.S. 794 (1976) 10

Hutto v. Finney,
437 U.S. 678 (1978) 9

In Re Ayers,
123 U.S. 443 (1887) 12

International Textbook Co. v. Pigg,
217 U.S. 91 (1910) 8

James v. Dravo Contracting Co.,
302 U.S. 134 (1937) 7

Kassel v. Consolidated Freightways,
49 U.S.L.W. 4328 (1981) 14, 15, 17

Katzenbach v. McClung,
379 U.S. 294 (1976) 10

Langnes v. Green,
282 U.S. 531 (1931) 2

Ludwig v. Western Union Tel. Co.,
216 U.S. 146 (1910) 8

Lynch v. Household Finance Corp.,
405 U.S. 538 (1972) 10, 11, 18

Maine v. Thiboutot,
448 U.S. 1 (1980) 9

Morgan v. Virginia,
328 U.S. 373 (1946) 10

Northcross v. Board of Education,
412 U.S. 427 (1973) 3

Owen v. City of Independence,
445 U.S. 622 (1980) 17

Raymond v. Rice,
434 U.S. 429 (1978) 9, 16

Sioux Remedy Co. v. Cope,
235 U.S. 197 (1914) 8

Sterling v. Constantin,
287 U.S. 378 (1932) 14

United States v. Ballard,
322 U.S. 78 (1944) 2

West v. Kansas Natural Gas Co.,
221 U.S. 229 (1911) 7, 8

Western Union Tel. Co. v. Kansas,
216 U.S. 1 (1910) 6

STATUTES AND RULES

28 U.S.C. §1331 12

28 U.S.C. §1343 11

42 U.S.C. §1983 ..... *passim*

42 U.S.C. §1988 ..... *passim*

49 U.S.C. §10922 14

Rule 21.1(a), Rules of the Supreme Court 2

Rule 34.1(a), Rules of the Supreme Court 2

Rule 34.2, Rules of the Supreme Court 2

CONSTITUTIONAL PROVISIONS

United States Constitution

Article I, §8 ..... *passim*

Article III 13

Article IV, §2 7

First Through Ninth Amendments 13

Fifth Amendment 13

Eleventh Amendment 3, 9

Fourteenth Amendment 14

OTHER MATERIALS

ARTICLES OF CONFEDERATION 5, 6, 16

MASSACHUSETTS CONSTITUTION of 1780, art. I 5

B. POORE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAW OF THE UNITED STATES 5

J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1873) 6

VERMONT CONSTITUTION of 1777 5

VIRGINIA BILL OF RIGHTS (1776) 5

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I. THE ONLY ISSUE PROPERLY BEFORE THIS COURT IS THE REFUSAL OF THE COURT OF APPEALS TO GIVE A REASON FOR ITS DECISION.

A. RESPONDENTS' BRIEF VIOLATES THE RULES OF THIS COURT.

This Court granted certiorari on the single question of whether the Eighth Circuit must give a reason for denying attorneys fees. That was the only question presented in

the Petition for Certiorari. It was acceded to by Respondents[1] ("Iowa") and briefed by Petitioner ("CF").

Rule 21.1(a) of this Court states in part:

> "Only the questions set forth in the petition or fairly included therein will be considered by the Court."

Rules 34.1(a) and 34.2 of this Court further confine the parties to briefing the question presented in the Petition, though the respondent may take exception with the form of the questions.

Iowa's brief, however, lists four questions presented, only one of which is even arguably consistent with the Petition for Certiorari and Response on Certiorari.[2] The brief is inconsistent with the intent of the Rules and a workable appellate process.

B. IOWA'S BRIEF ILLUSTRATES WHY A LOWER COURT OPINION IS NECESSARY.

A lower court opinion is necessary to permit effective review of the Eighth Circuit's decision. Without an opinion, this Court cannot determine what combination of the possible factual and legal issues formed the basis of the

[1]Compare the "Question Presented" in the Petition for Certiorari and in the Response to the Petition for Certiorari.

[2]Iowa contends that there is an exception to the rule and that respondents may argue any issue that supports the decree below. That exception is well recognized, *Langnes v. Green*, 282 U.S. 531 (1931), but it cannot be applied where the basis of the appeal is the lack of any statement of reasons below. *Semble*, *Dandridge v. Williams*, 397 U.S. 471, 475 n. 6 (1969); *United States v. Ballard*, 322 U.S. 78, 88 (1944)

Adoption of Iowa's view would ensure that every appeal on the basis of a lack of opinion would become an appeal on the merits of the case, thereby begging the question of whether an opinion is needed for proper appellate review.

Eighth Circuit's decision. Neither party can adequately present the case on appeal, nor can this Court adequately review it. The Circuit Courts of Appeals, including the Eighth, require that trial courts state their reasoning when denying attorneys fees. Brief of Petitioner at 12-13. This Court has similarly required a statement of reasoning when attorneys fees are decided initially by a Court of Appeals. *Northcross v. Board of Education*, 412 U.S. 427 (1973).

Iowa contends that the basis of the Eighth Circuit's decision can easily be discerned because Iowa's brief in the Circuit Court below raised only one issue.[3] They are wrong. No brief was filed by either party prior to the Eighth Circuit's decision. The Eighth Circuit decided the issue without briefs.[4] The only briefs filed in the Eighth Circuit were short briefs later filed on the Motion to Vacate. Those subsequent briefs were obviously not a basis for the initial decision. CF requested the opportunity to file a full brief in the Motion to Vacate, but the request was denied. Appendix at 26, 29.

Iowa contends that there can be only one reason for the Eighth Circuit's denial of fees,[5] but Iowa's brief advances three different reasons for the denial: (1) §1983 does not apply to Commerce Clause cases, Brief of Respondents at 7-37; (2) the Eleventh Amendment bars awards of attor-

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[3]Brief of Respondents at 42.

[4]By letter from the Clerk, the Eighth Circuit directed CF to file a Bill of Costs. No provision was made for briefs on the Bill of Costs.

CF included attorneys fees in the Bill of Costs to avoid waiver and suggested remand to the trial court. Appendix at 19. CF did not, as Iowa suggests, choose the Court of Appeals as the forum.

[5]Brief of Respondents at 41-42.

neys fees against states, Brief of Respondents at 38-41; and (3) corporations have no right to engage in interstate commerce, Brief of Respondents at 37-38. We do not know, Iowa does not know, and this Court does not know, why the Eighth Circuit ruled as it did. Without that knowledge, effective appellate presentation is nearly impossible and effective review foreclosed.[6]

We do not suggest that all the issues presented by Iowa are trivial or obvious. The importance of some of those issues emphasizes the need for an ordered presentation of the case in the lower courts and an ordered presentation before this Court. Awarding attorneys fees in Commerce Clause cases is a matter of first impression. It should not be a matter upon which this Court acts before any lower court determinations.

C. THIS COURT SHOULD CONSIDER ONLY THE QUESTION PRESENTED.

CF urges the Court to confine itself to the question upon which certiorari was granted. Should this Court, nonetheless, decide to determine the questions raised by Iowa, the remainder of this reply brief addresses those questions.

II. THE CONSTITUTION SECURES THE RIGHT TO ENGAGE IN INTERSTATE COMMERCE FREE FROM IMPROPER STATE REGULATION.

A. THE CONSTITUTION DOES NOT CREATE RIGHTS.

Neither the Constitution nor government creates rights. Fundamental rights are "natural, essential, and inalienable."[7] One of the purposes of government is to protect

those rights. A principal purpose of the Constitution is to protect those rights from their most frequent enemy, government itself.

When the Constitution was drafted, property rights were recognized as natural and inalienable rights. The broad category of property rights included the right to engage in commerce. A number of the state constitutions adopted after the revolution recognized the right to "acquire, possess, and protect" property as natural and inalienable.[8] The Articles of Confederation specifically expressed a personal right to engage in interstate commerce:

> "...the people of each state shall have free regress and egress to and from any other state and shall enjoy therein all the privileges of trade and commerce...." ARTICLES OF CONFEDERATION, art. IV.

Justice Marshall, in the seminal decision on the Commerce Clause, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), specifically recognized an inherent natural right to engage in interstate commerce:

> "In pursuing this inquiry at the bar, it has been said, that the constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose

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[6]For instance, Iowa argues that a denial of fees on the basis of "eligibility" requires no opinion, but concedes that a denial on the basis of "entitlement" should have a statement of reasons. Brief of Respondents at 42-45. Some statement of reasoning is necessary, however, to determine which of the two bases was used for denial.

[7]MASS CONST. of 1780, art. I.

[8]See e.g., MASS. CONST. of 1780, art. I; VERMONT CONST. of 1777, Chap. 1, art. I; VA. BILL OF RIGHTS, 1776, §1; reproduced in B. POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTER, AND OTHER ORGANIC LAWS OF THE UNITED STATES, 957, 1859, 1908 (1877).

authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right, and gave to Congress the power to regulate it." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

The existence of the right to engage in interstate commerce, like the existence of other rights, is not dependent on the Constitution. It is, however, protected by the Constitution.

B. The Right To Engage In Interstate Commerce Is Secured By The Constitution.

The primary threat to an individual's right to engage in interstate commerce is state government. The initial motivation for the replacement of the Articles of Confederation by the Constitution was the inadequate protection of interstate commerce from the acts of the individual states. *H.P. Hood v. Du Mond*, 336 U.S. 525, 533 (1949). Interstate commerce suffered from conflicting regulations designed by each state to obtain benefits for itself at the expense of its neighbors.[9]

The drafters of the Constitution recognized the problem to be inherent in state regulation. Accordingly, the power to regulate interstate commerce was removed from the states and placed in the federal government. Though this Court has frequently redefined the limits of what the states

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[9] "... [E]ach State would legislate according to its estimate of its own interest, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view. To do otherwise would be to sacrifice its immediate interest, without any adequate or enduring consideration; to legislate for others, and not for itself; to dispense blessings abroad, without regarding the security of those at home." J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §259 (1873).

may do, this Court has always recognized and protected an individual right to engage in interstate commerce:

> "But the statute, requiring the corporation . . . to surrender *a right and privilege secured to it by the Constitution and laws of the United States* was unconstitutional and void . . ." *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 36 (1910).
>
> "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).
>
> "[I]n a leading case, *Oklahoma v. Kansas Natural Gas Co.*, 221 U.S. 229. . . . [t]he court held that . . . the right to engage in interstate commerce is not the gift of a state, and the state cannot regulate or restrain it." *H.P. Hood v. Du Mond*, 336 U.S. 525, 535 (1949).
>
> "[The State] imposes a direct burden on the plaintiff's right to engage in interstate business and therefore is in violation of its constitutional rights." *Buck Stove & Range Co. v. Vickers*, 226 U.S. 205, 216 (1912).
>
> "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject." *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891).[10]

Accord, James v. Dravo Contracting Co., 302 U.S. 134, 158 (1937); *Furst v. Brewster*, 282 U.S. 493, 498 (1931);

[10]Iowa contends that corporations have no standing to assert "privileges and immunities" under art. IV, §2. Corporations, however, possess "rights." *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). As the material quoted makes clear, there is a right to engage in interstate commerce which corporations possess.

Sioux Remedy Co. v. Cope, 235 U.S. 197, 201 (1914); *Barrett v. City of New York*, 232 U.S. 14, 31 (1914); *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 260 (1911); *International Textbook Co. v. Pigg*, 217 U.S. 91, 112 (1910); *Ludwig v. Western Union Tel. Co.*, 216 U.S. 146, 160 (1910).

III. SECTION 1983 APPLIES TO VIOLATIONS OF OF THE COMMERCE CLAUSE.

A. COMMERCE CLAUSE CASES ARE WITHIN THE PLAIN LANGUAGE OF §1983.

As the cases cited *supra* make clear, this Court has repeatedly asserted that the right to engage in interstate commerce is a "right secured by the Constitution." That is precisely what is covered by 42 U.S.C. §1983:

> "Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any *rights*, privileges or immunities *secured by the Constitution* and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."[11] [Emphasis added]

A restrained approach to what constitutes a "right" and a narrow application of the words of the statute yield the result that this case is covered by §1983.

B. THIS COURT HAS NO PRECEDENT FOR DENYING §1983 COVERAGE OF THE RIGHT TO ENGAGE IN INTERSTATE COMMERCE.

Few cases have arisen in which §1983's application to the Commerce Clause has been determined.[12] Commerce

Clause cases are few in number, and several alternate jurisdictional statutes are normally applicable.[13] The recent passage of 42 U.S.C. §1988 makes the availability of §1983 an issue.[14]

Because §1983 is applicable on its face, Iowa has argued the existence of three distinctions which, Iowa contends, should exclude §1983 coverage. Precedent and constitutional theory do not support these distinctions.

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[11]In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court strongly endorsed relying on the plain language of §1983. The Court stated:

> "[T]he legislative history does not permit a definitive answer. . . . [but] the legislative history does not demonstrate that the plain language was not intended. Petitioners' arguments amount to the claim that had Congress been more careful, and had it fully thought out the relationship among the various sections, it might have acted differently. That argument, however, can best be addressed to Congress, which, it is important to note, has remained quiet in the face of our many pronouncements on the scope of §1983." 448 U.S. at 8.

Though some cases cast doubt as to whether the words "and laws" embrace all federal statutes, *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979), the historical reasoning for confining that phrase cannot be used to confine rights secured by the Constitution itself.

[13]*Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1305 (D. Mont. 1975), aff'd on other grounds 425 U.S. 463 (1976). *Czajkowski v. Illinois*, 460 F. Supp. 1265, 1277-80 (N.D. Ill. 1977), cited by Respondents, expressly limits its holding to tax cases.

[13]Damages are normally not available under §1983 because of legislative immunity. Consequently, §1983 has not been an issue in Commerce Clause cases predating §1988. *Raymond v. Rice*, 434 U.S. 429 (1978), for instance, alleged violation of §1983, but the issue was never considered by the courts because no damages or attorneys fees were requested.

[14]Contrary to Iowa's brief, §1988 attorneys fees are not barred by the Eleventh Amendment, *Hutto v. Finney*, 437 U.S. 678 (1978).

The first distinction argued by Iowa is, of necessity, only delicately intimated. Iowa suggests that some rights are "individual liberties" and are covered by §1983, whereas others, largely property rights, are not "individual liberties." The argument was squarely rejected in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972):

> "Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel is in truth a 'personal' right. . . . " 405 U.S. at 552.

Lynch's reasoning is sound. Though we often speak of an unconstitutional burden on interstate commerce, in reality we mean an unconstitutional interference with the rights of people. "Interstate commerce" really means the right of the Chicago manufacturer to sell his goods in California, the Nebraska farmer his wheat in New York. It is that right which the Commerce Clause is designed to protect from improper state regulation. *See, Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808 (1976).[15]

Second, Iowa contends that the Commerce Clause is like the Contract Clause and that this Court has held §1983 to be inapplicable to Contract Clause cases. Iowa rests this contention upon *Carter v. Greenhow*, 114 U.S. 317

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[15]Many of the significant advances in protecting equal rights have been founded on the Commerce Clause, either as a source of legislative power, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1976); or by its own power, *Morgan v. Virginia*, 328 U.S. 373 (1946). It seems implausible that the Commerce Clause can protect these rights at its periphery, but none at its core.

(1885).[16] *Carter* has been limited as being applicable solely to tax matters. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 542 n. 6 (1972). Nonetheless, Iowa relies upon it for two points: (1) that there is no right secured by the Contract Clause and (2) that 28 U.S.C. §1343 and 42 U.S.C. §1983 are not applicable to Contract Clause cases. Both points rest upon a misconstruction of *Carter*.

In *Carter* the plaintiff sued only for a $200 money judgment for loss of his property in a tax foreclosure, arguing that the state impaired a contract by refusing to accept bond coupons for taxes. The plaintiff neither sought an injunction against the offending statute nor did he seek an award for damage to his constitutional rights. *Carter* distinguishes between the right to have a state statute impairing contracts held unconstitutional and the right to have a specific contract enforced. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 613 n. 29 (1979). The latter right is not directly secured by the Constitution.

> "In any judicial proceeding necessary to vindicate his rights under a contract, affected by such legislation [impairing contracts], the individual has a right to have a judicial determination, declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution. But of this right the plaintiff does not show that he has been deprived. He has simply chosen not to resort to it. The right to pay his taxes in coupons, and the immunity from further proceedings, in case of a rejected tender, are not rights directly secured to him by the Constitution, and only so indirectly as they happen

[16]The other case cited by Iowa in support of *Carter* is *Holt v. Indiana Mfg. Co.*, 176 U.S. 68 (1900). That tax case holds that §1983 has no application to impairments of contract, deprivation of property without due process, or equal protection. It is clearly erroneous unless confined to the tax setting, and questionable there.

> in this case to be the rights of contract which he holds under the laws of Virginia. . . ." *Carter v. Greenhow*, 114 U.S. 204 (1885).

Carter does not state that there is no individual right secured by the Contract Clause, indeed it states the opposite.

Iowa's second point about *Carter* rests upon some admittedly abstruse *dicta*. The *dicta* states that the sole basis of federal jurisdiction would be a writ of error or the Act of March 3, 1875 (the predecessor of 28 U.S.C. §1331), and not §1979, Rev. Stats. (the predecessor of 42 U.S.C. §1983). Iowa incorrectly reads this *dicta* to mean that §1983 is never applicable. The *dicta* states that §1983 is not applicable where the action is one based on contract law with the constitutional right offered as a collateral matter. That reading is supported by the case which *Carter* cites in support of its *dicta*, *The Civil Rights Cases*, 109 U.S. 3, 12-13 (1883). In *The Civil Rights Cases* the Court stated that Congress was without power to provide federal jurisdiction for the general litigation of contracts, but that it may have given jurisdiction in the predecessor of 28 U.S.C. §1331 over contracts which were impaired by state statutes in violation of the Constitution. Thus, *The Civil Rights Cases* support reading the *dicta* in *Carter* as meaning that §1331 was the only basis of federal jurisdiction over a contract case in which a constitutional right is collaterally at issue. This reading of the *dicta* in *Carter* is also supported by Justice Matthews, the author of *Carter*, who two years later summarized *Carter* as holding that there was no federal jurisdiction under §1343 and §1983 for action on the denial of a right secured by the underlying contract. *In Re Ayers*, 123 U.S. 443, 504 (1887).

Finally, Iowa contends that the Constitution may be

divided into two mutually exclusive parts. One part concerns only rights, the other part only the form of government. The Commerce Clause, Iowa says, relates solely to the form of government as an allocation of power.

The dichotomy assumed by Iowa does not exist, nor is it consonant with the philosophy or style of the Constitution.

The principal protection of individual rights under the Constitution is not the Bill of Rights. The principal protection is created by the allocation and limitation of power, both between the states and the federal government, and within the federal government. Article III and the statutes creating the federal judiciary are allocations of power. They have undoubtedly been more important in securing rights than the Bill of Rights. The requirement that revenue bills originate in the House of Representatives, which is elected every two years, is also an allocation of power. It has probably done more to secure the citizen's property rights from federal government than the Fifth Amendment. Iowa is correct when it states that many constitutional provisions allocate power, but it is wrong when it assumes that removals or grants of power have nothing to do with securing rights. Limitations on governmental power are the principal method of securing rights.

We do not suggest that all constitutional provisions secure rights, no matter how indirect the connection among the right, the constitutional provision involved, and the violation.[17] However, when a power of government is removed from the states by the Constitution for the specific purpose, among others, of preventing state legislation that

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[17]See *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979).

infringes on a recognized right, and when the state unlawfully seeks to infringe upon that right, then the state is violating a "right secured by the Constitution." That is the case here.

C. Even Were Iowa's Analysis Correct, §1983 Would Be Violated

Were any or all of Iowa's distinctions accepted as to which rights are covered by §1983, the act would apply in this case. This case falls within the well polished confines of the Fourteenth Amendment. The Fourteenth Amendment specifically prohibits depriving a person of property without due process of law. Iowa's prohibition against the operation of twin trailers in Iowa deprived Plaintiff of property.[18] Moreover, it is settled that Iowa lacked the legal power to prohibit the vehicles. *Kassel v. Consolidated Freightways*, 49 U.S.L.W. 4328 (1981). The first element of due process of law is that the person acting have the authority and jurisdiction to act.[19] Accordingly, Iowa deprived CF of property without due process of law. Thus, even were we to confine §1983 to its narrowest ambit, rights specifically contained within the Fourteenth Amendment, the statute would still apply to this case.

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[18]The plaintiff in *Kassel* had the value of its business diminished, as well as the then salable value of its federal Certificate of Convenience and Necessity issued under 49 U.S.C. §10922. *Kassel v. Consolidated Freightways*, 49 U.S.L.W. 4328, 4328 (1981).

[19]*Sterling v. Constantin*, 287 U.S. 378, 397 (1932).

IV. SOUND POLICY SUPPORTS THE APPLICATION OF 42 U.S.C. §1983 AND §1988 TO COMMERCE CLAUSE CASES.

A. THE POLICY CONSIDERATIONS BEHIND 42U.S.C. §1988 ARE STRONGLY PRESENT IN COMMERCE CLAUSE CASES.

There are four main policy reasons for awards of attorneys fees in §1983 cases:

1. To encourage the resolution of cases that present issues of broad public benefit.

2. To encourage a realistic approach to settling cases.

3. To encourage quality representation in cases involving public policy and individual rights.

4. To prevent loss of rights because of an inability to obtain qualified lawyers to defend them.

Three of these factors are strongly present in nearly all Commerce Clause cases. The last is present in some. First, Commerce Clause cases involve significant conflict between the broad public interest and the interest of one state. Second, they are rarely resolved short of trial because settlement is politically difficult for the state. Third, they are complex and expensive to prepare and prove, particularly when safety is involved. Fourth, there may be cases of substantial merit but of insufficient benefit to any individual party to justify his undertaking the representation of all.

In *Kassel*, as in many Commerce Clause cases, the public

won. Motorists and truckers will have fewer accidents. Taxpayers will pay for less roadwear. Less diesel fuel will be used. Consumers will pay less for goods because of a reduction in shipping costs. *Consolidated Freightways v. Kassel*, 475 F. Supp. 544, 550 (1979).

Had Iowa prevailed, all these advantages would have been lost. Iowa's politicians behaved properly within their narrow political framework, but that is precisely the point. Iowa's viewpoint was too narrow, its constituency too small, for it to perceive the broader advantages. States will not normally view the overall result, but only the result within the particular state. This predictable state myopia is what caused the economic chaos that quickly developed under the Articles of Confederation. Attorneys fees awards will encourage representation that will benefit the public.[20]

Unfortunately, the same political pressures that encourage burdensome and discriminatory state regulation cause continued litigation rather than settlement of Commerce Clause disputes. As with Governor Wallace in the school house door, it is to the local politician's advantage to force the federal courts to order what should be done, rather than accepting the political criticism that results from taking the proper course voluntarily. Legislative immunity from damages encourages that stance. Allowing attorneys fees under §1988 in Commerce Clause cases would encourage settling matters whose end result can be reasonably anticipated.

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[20]To meet the test enunciated in *Raymond v. Rice*, 434 U.S. 429 (1978), the overall benefits must outweigh the detriment. In almost every significant Commerce Clause case decided by this Court, a group of immediate beneficiaries beyond plaintiff can easily be identified, and a still larger group of secondary beneficiaries can also be identified.

Iowa, in its brief, contends that attorneys fees should be denied because they may be a substantial drain on the state's budget.[21] Such awards, Iowa says, may "punish" the state for enacting statutes found to be unconstitutional. Though not cast in those pejoratives, that was certainly one of the purposes intended by Congress. As this Court stated in regard to §1983 damages:

> "Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. . . . To criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's raisons d'être." *Owen v. City of Independence*, 445 U.S. 622, 656 (1980). [Footnote omitted]

This Court has also stated that ordering fees to be paid from the public treasury is a proper application of §1983 and §1988. *Owen, supra*, at 655. Although legal fees may not bar a large corporate plaintiff from asserting these complex issues, the high cost of litigating these cases makes the attorney fees a factor for even the largest corporations.

It is perhaps equally important to note what awards of attorneys fees will not do. There will be no substantial

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[21]Iowa is miscast as Cassandra in this instance. Iowa's own analysis found that it will obtain more revenues from taxes on twin trailers than it will suffer costs. *Consolidated Freightways v. Kassel*, 475 F. Supp. 544, 550 (1979); "Sixty-Five Foot Twin Trailers On Iowa Highways" (Iowa DOT, 1975), Appendix at 580, 596-97, *Kassel v. Consolidated Freightways*, 49 U.S.L.W. 4328 (1981). The excess revenues are far greater than any award of fees would be.

increase in Commerce Clause litigation. Because of the high cost of litigating these matters, cases without substantial merit will not be filed, as fees are only awarded upon success. The pressures toward settlement are likely to offset any increase in the number of Commerce Clause cases filed if §1988 is held to apply. Only attorneys and expert witnesses will suffer losses from settlement.

B. If This Court Holds That §1983 Does Not Apply To Commerce Clause Rights, It Will Jeopardize Firmly Established Concepts Of Standing, Statutory Interpretation, And Individual Access To The National Economic System.

Consider the effect on the law if the Court determines there was no constitutional right to engage in interstate commerce covered by §1983. First, the Court would have to overrule the many previous cases which state that there is a right, secured by the Constitution, to engage in interstate commerce. Second, the Court would make the plaintiff's position in Commerce Clause cases unusual. The plaintiff would simply be there at his own expense to trigger the litigation, as Iowa would put it, of the allocation of governmental powers. The plaintiff's own interests would be ancillary. Third, the Court would be ruling against the plain wording of §1983, which Congress has not chosen to limit. Finally, and perhaps most importantly, the Court would destroy the fundamental right of individual access to a national economy. It would, in essence, say that a savings account is protected under §1983, see *Lynch*, *supra*, but the means of creating and enlarging

that savings account are not. Such a determination would fail to address the reality of the specialized, integrated, economic system we now have in America.

CONCLUSION

This Court has the power to decide the principal underlying legal issues in this matter. It should not exercise that power.

The underlying legal issues here are important, but this case reaches the Court in an awkward posture. There are no decisions below that can aid the Court. The parties are unable to agree on the issues or present focused briefs and arguments.

Moreover, this case presents an important procedural issue. If Courts of Appeals are to initially grant or deny attorneys fees, this Court should require statements of reasons to permit review. If attorneys fees under §1988 should normally be first determined by the District Courts with appeal as of right to the Courts of Appeals, this Court should so state.

Petitioner respectfully requests that this Court reverse the decision below for failure to state reasons and remand to the Circuit Court with instructions to remand to the District Court. Should this Court decide to determine the underlying issues, Petitioner requests that this Court hold

§1988 to be applicable for the reasons stated. This Court should then remand to the Eighth Circuit with instructions to remand to the District Court to determine the amount of fees or if special circumstances exist warranting denial of fees.

Respectfully submitted,

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